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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 442

ELIZABETH GURLEY FLYNN, PETTIS PERRY, CLAUDIA JONES, ALEXANDER BITTELMAN, ALEXANDER TRACHTENBERG, VICTOR JEREMY JEROME, ALBERT FRANCIS LANNON, LOUIS WEINSTOCK, ARNOLD SAMUEL JOHNSON, BETTY GANNETT, JACOB MINDEL, WILLIAM WOLF WEINSTONE and GEORGE BLAKE CHARNEY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

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15 American Law Review, 81 (Thayer) 26

Boudin, "Seditious Doctrines" and "Clear and Present Danger" Rule, 1952, 38 Va. Law Rev. 143, 343-344 ..... 49, 49fn

Department of State Publication 3573, August 1949, United States Relations with China 47

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No.

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Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Elizabeth Gurley Flynn, Pettis Perry, Claudia Jones, Alexander Bittelman, Alexander Trachtenberg, Victor Jeremy Jerome, Albert Francis Lannon, Louis Weinstock, Arnold Samuel Johnson, Betty Gannett, Jacob Mindel, William Wolf Weinstone and George Blake Charney respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (A. App. 259-260)* affirming the judgments of conviction herein of the District Court for the Southern District of New York.

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*We thus refer to papers printed in the appendix record in the Court of Appeals. Minutes of the trial not printed in the appendix are hereinafter referred to as Tr. . Government exhibits are referred to as GE ; and petitioners' exhibits are referred to as DE .

Opinions Below

The opinion of the Court of Appeals (A. App. p. 186) is not yet reported. Judge DIMOCK's opinion overruling the challenge to the jury (A. App. 27) is reported at 106 F. Supp. 966.

Statement as to Jurisdiction

The judgment of the Court of Appeals was rendered on October 14, 1954, and it was entered in the office of the Clerk of said Court on the same day (A. App. 261). No petition for rehearing was filed in the Court of Appeals; hence there is no order respecting a rehearing. The jurisdiction of this Court is invoked under 28 U. S. C., section 1254(1).

Questions Presented for Review

1. Whether, because of the vagueness and indefiniteness of the standard of "clear and present danger" as defined in *Dennis* v. *United States*, 341 U. S. 494, 510, proof of the specific intent on the part of an accused to teach and advocate the overthrow of the Government of the United States by force and violence and to bring such overthrow about, is necessary to support a constitutional application to the accused of the Act and the standard.

2. Whether, if such proof is constitutionally required, the Smith Act and the standard of clear and present danger were constitutionally applied to these petitioners, in view of the fact that the trial judge, over the timely objection and exception of the petitioners, authorized the jury in his charge to predicate a finding of such intent on the basis of acts and declarations of alleged co-conspirators which were not shown to have been specifically authorized by the petitioners or actually known to and ratified by them.

3. Whether the petitioners, having made timely application therefor, were entitled to a trial or hearing of the issue of clear and present danger by either the trial judge or the jury.

4. Whether there was, at the date of the indictment herein, i.e., June 20, 1951, a clear and present danger, within the meaning given to that standard in the opinion of Chief Justice VINSON in the *Dennis* case, that an attempt at the forcible and violent overthrow of the Government of the United States would be made.

5. Whether as to each of the petitioners the evidence was sufficient to sustain the conviction.

6. Whether the trial judge prejudicially erred in the admission and reception of evidence.

7. Whether the trial court improperly denied petitioners' challenge to the jury system and supporting motions.

8. Whether petitioners were denied a trial by an impartial jury in that the climate of prejudicial opinion which pervaded the community made trial by an impartial jury impossible.

9. Whether the trial judge improperly denied petitioners' motion for mistrial on the ground of the misconduct of jurors.

Statutes Involved

The general conspiracy statute, 18 U. S. C. 371, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The Smith Act, as incorporated in the recent revision of the Federal Criminal Code, 18 U. S. C. 2385, provides:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or,
>
> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
>
> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

The Smith Act as it existed prior to the revision of the Federal Criminal Code, Act of June 28, 1940, c. 439, Title I, 54 Stat. 670-671, 18 U. S. C. (1940 ed.) secs. 10 and 11, provided:

Section 2. (a) it shall be unlawful for any person—

1. to knowingly or wilfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;

2. with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

3. to organize or help to organize any society, group or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

(b) For the purposes of this section, the term "government in the United States" means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them.

Section 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit any of the acts prohibited by the provisions of this title.

Section 4(f) of the Internal Security Act of 1950, 64 Stat. 992, 50 U. S. C. 783(f), provides in part:

Neither the holding of office nor membership in any Communist organization by any person shall consti-

tute per se a violation of subsection (a) or subsection (c) of this statute or of any other criminal statute.

28 U. S. C. A. Chapter 121—*Juries; Trial by Jury*:

Section 1861. *Qualifications*

Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

(1) He has been convicted of a crime * * *.

(2) He is unable to read, write, speak and understand the English language.

(3) He is incapable by reason of mental or physical infirmities to render efficient jury service.

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district is held.

Section 1863. *Exclusion or Excuse from Service*

(a) A district judge for good cause may excuse or exclude from jury service any persons called as a juror.

(b) Any class or group of persons may, for the public interest, be excluded from the jury panel or excused from service as jurors by order of the district judge based on a finding that such jury service would entail undue hardship, extreme inconvenience or serious obstruction or delay in the fair and impartial administration of justice.

(c) No citizen shall be excluded from service as grand or petit juror on account of race or color.

New York Judiciary Law.

Section 502. *Qualifications of Trial Jurors*

In order to be qualified to serve as a trial juror, in a court of record, a person must be:

(1) A citizen of the United States, and a resident of the county.

(2) Not less than twenty-one nor more than seventy years of age.

(3) The owner, in his or her own right, of real property of the value of one hundred and fifty dollars, or of personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value.

(4) In the possession of his natural faculties, and not infirm or decrepit.

(5) Free from all legal exceptions; of fair character; of approved integrity; of sound judgment; and well informed.

Section 596. *Qualifications of Jurors*

In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must:

Be intelligent, of sound mind and good character;
Well informed; able to read and write the English language understandably.

Constitutional Provisions Involved

AMENDMENT I

Congress shall make no law respecting an establishment of religion. or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statement of the Case

The indictment was returned on June 20, 1951, against the thirteen petitioners herein and eight other defendants (A. App. 4-11). Of the latter, four were not apprehended prior to commencement of the trial. The trial was severed as to two others because of illness. And two defendants were, on motion for acquittal, acquitted by the Court at the close of the Government's case (A. App. 1-3).

The indictment (A. App. 4-11) charges in a single count a conspiracy under Section 3 of the Alien Registration Act of 1940, commonly known as the Smith Act (54 Stat. 671; 18 U. S. C. (1946 ed.) §11; 18 U. S. C. (1948 ed.) §371) to engage in conduct prohibited by Section 2 of the Act (18 U. S. C. (1946 ed.) §10; 18 U. S. C. (1948 ed.) §2385), to wit: "(1) Unlawfully, wilfully, and knowingly, to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence; and (2) unlawfully, wilfully, and knowingly, to organize and help to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence" (A. App. 4-5).

The trial judge held that the statute of limitations had run against the charge of conspiracy to organize the Communist Party and therefore instructed the jury that they could not find any of the petitioners guilty thereof (A. App. 135-136).

The indictment charged the commission of twenty-nine overt acts, none of which in itself constituted an offense under the laws of the United States (A. App. 7-11). The Government did not contend that more than six of the overt acts had been charged (A. App. 139).

The petitioners moved prior to trial for continuance and during the trial for mistrials on the ground that they were being deprived of the right to an impartial jury by being forced to trial in an environment of violent hostility against them, much of which had been engendered by agencies of Government (Vol. VI, Doc. Nos. 179, 180, 202; Vol. VIII, Doc. No. 237; Vol. VIII, Doc. No. 277; Vol. IX, Doc. No. 283).* All of said motions were denied.

On February 27, 1952, prior to the trial of the indictment, petitioners filed written notice that they would

* Since the prejudicial climate alleged was nationwide, no purpose would have been served by a motion for change of venue; hence no such motion was made.

"challenge the array and move to quash and dismiss the entire panel, venire and jury list, on the ground that the methods of choosing the array, panel, venire and juries are such as to preclude the selection of a representative cross section of the community for service on the juries of this Court" (Vol. V, Doc. No. 150). More specifically, the documents thereafter filed by petitioners in support of said challenge alleged the following objections to the method of jury selection in the Southern District: (1) That Negroes, Puerto Ricans and manual workers were intentionally and systematically limited to mere token representation on the jury list; (2) that the responsible jury officials failed to employ methods which would ensure representation of a cross-section of the community in the composition of the jury list; and (3) that the basic jury list was so weighted with and loaded by numerically small but economically dominant groups in the community, as to preclude a fair and impartial trial of these petitioners, who advocated policies in conflict with the interests of said groups (Vol. VI, Doc. Nos. 181, 189, 191, 199). On April 15, 1952, in an oral order from the bench, the trial judge denied petitioners' challenge (Tr. 702) and thereafter, on July 25, 1952, filed his written opinion thereon (A. App. 27).

In the course of the trial the trial judge over the timely objection of the petitioners admitted testimony that was incompetent, irrelevant and immaterial and of so inflammatory a nature as to make a fair trial impossible (A. App. 73-81).

After the evidence was in but prior to the conclusion of the trial a letter came to the trial judge which stated "that the jurors have said that Marxists all want to overthrow the Government by force" (A. App. 117). On December 17, 1952, he conducted an interrogation of the jurors (A. App. 117-125). At the conclusion of the interrogation he excused one of the jurors, Mrs. Sybil Kane (A. App. 125-126), and although there were indications by an-

other of the jurors, Miss Miller, that other jurors had also said "that Marxists all want to overthrow the Government by force" (A. App. 122), the trial judge refused to grant petitioners' motion for a mistrial. On December 18, 1952, the morning after she had been excused as a juror, Mrs. Kane telephoned Mrs. Mary M. Kaufman, one of the attorneys for the petitioners, and said in substance that with the exception of one or two, "all of the jurors have discussed the issues involved in the case and have expressed opinions and judgments thereon", and that "at least four of the jurors have held and expressed a judgment on the case adverse to the defendants 'right along'" (Vol. VII, Doc. No. 268). On the strength of these statements of Mrs. Kane, which were embodied in an affidavit by Mrs. Kaufman (Vol. VII, Doc. No. 268), petitioners moved for a further investigation of the conduct of the jurors (Tr. 14061), but the trial judge denied their application (Tr. 14087). Petitioners thereupon subpoenaed Mrs. Kane to appear on December 19, 1952, and, in support of an application which they then made to the trial judge for a reconsideration of his denial of a further investigation into the conduct of the jurors, offered to call Mrs. Kane as a witness to testify in respect to the matters set forth in Mrs. Kaufman's affidavit (A. App. 127), but the trial judge denied this application (A. App. 128); whereupon petitioners moved for a mistrial, which the judge denied (A. App. 128).

At the close of the Government's case (Tr. 9751), as well as at the close of the entire case (Tr. 13760), petitioners moved for the direction of an acquittal on the ground that the evidence was legally and constitutionally insufficient to establish their guilt beyond a reasonable doubt. The insufficiency of the evidence is discussed *infra*.

Prior to the submission of the case to the jury petitioners filed a written motion with the trial judge in which they requested that the issue of "clear and present dan-

ger" be submitted to the jury, and in the alternative, that "if the Court reserves this issue for its own determination and bars the jury from considering it, we request the Court to hold a hearing on this issue and to permit the presentation of evidence and argument" (Vol. VIII, Doc. No. 275; Tr. 13412-13420). The trial judge denied this motion in all respects, saying among other things: "I consider that I have sufficient before me in the record and in the material of which I am entitled to take judicial notice to make the determination of clear and present danger" (Tr. 13671). In the argument made *infra,* petitioners contend that there was in fact no clear and present danger, as that term was defined in *Dennis* v. *United States,* 341 U. S. 494, 510, which would support a constitutional application of the Smith Act to these petitioners.

The trial judge also refused to instruct the jury, as the petitioners requested him to do, that "the acts or statements of some other member of the conspiracy not made with the actual knowledge or the prior request or authorization of a defendant may not be considered in determination of that defendant's personal intent" (Vol. IX, Doc. No. 284, p. 9). Over petitioners' timely objection, he authorized the jury to predicate a finding of petitioners' intent on the basis of third party acts and declarations which were not shown to have been authorized or adopted or ratified by petitioners (Vol. IX, Doc. No. 284, p. 10). Petitioners argue *infra* that the instructions as given to the jury resulted in an unconstitutional application of the Smith Act to these petitioners.

Reasons for Allowing the Writ

There are presented here for decision a number of important questions which have not been but should be settled by this Court. Several of the questions decided by the Court below have been decided in a way probably in conflict with applicable decisions of this Court. Some of the

questions are important in the administration of the Smith Act and are present in the cases named in the footnote in which appeals from convictions under the Smith Act are now pending.* The same questions are certain to arise in pending but untried cases as well as in future prosecutions under the Smith Act.

I

Proof of the specific intent of each petitioner to teach and advocate the overthrow of the Government by force and violence and to bring that result about as speedily as circumstances would permit, was necessary to a constitutional application of the Smith Act here. That intent, being constitutional in nature, was provable only by the acts and declarations of the accused himself or by those of third persons which he had actually authorized or knowingly ratified. By instructing the jury, over the timely objection of the petitioners, that they could find such intent on the basis of third party acts and declarations *not* so authorized or ratified by petitioners, the trial judge committed reversible error.

The petitioners contend that the trial judge's instructions to the jury resulted in an unconstitutional application of the Smith Act to them. They maintain that proof of their specific intent to teach and advocate the forcible and violent overthrow of the Government of the United States and to bring such overthrow about, was required not only by the statute, but by the First and Fifth Amendments; and that that intent could be proved only by their own acts and declarations or by those of third persons which they had actually authorized or knowingly adopted or ratified.

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* *United States* v. *Yates, et al.*, 9th Cir., No. 13480; *United States* v. *Wellman, et al.*, 6th Cir., No. 12237; *United States* v. *Huff, et al.*, 9th Cir.; *United States* v. *Fujimoto, et al.*, 9th Cir.; *United States* v. *Mesarosh, et al.*, 3rd Cir.; *United States* v. *Forest, et al.*, 8th Cir.; *United States* v. *Kuzma, et al.*, 3rd Cir.

The trial judge refused to instruct the jury, as the petitioners requested him to do, that "the acts or statements of some other member of the conspiracy not made with the actual knowledge or the prior request or authorization of a defendant may not be considered in determination of that defendant's personal intent" (Vol. IX, Doc. No. 284, p. 9). Instead, over petitioners' timely objection, he authorized the jury to predicate a finding of petitioners' intent on the basis of third party acts and declarations which were not shown to have been authorized, or adopted or ratified by petitioners. In so doing he authorized the jury to base their finding of the intent necessary to a constitutional application of the statute on evidence not rationally probative thereof. Hence, the verdict does not constitute the finding necessary to support the application of the Smith Act to these petitioners.

Petitioners' argument in support of the foregoing may be summarized as follows:

The opinion of Chief Justice VINSON in *Dennis* v. *United States*, 341 U. S. 494, 514-515, held that the Smith Act "may be applied where there is a 'clear and present danger' of the substantive evil which the legislature had the right to prevent." The opinion recognized, however, that "clear and present danger" as therein defined, i.e., "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger" (341 U. S. at 510), is not sufficiently definite to give fair notice of the circumstances in which speech is proscribed; and, hence, that it is not sufficiently definite to permit of the punishment of speech, consistently with the requirements of the First and Fifth Amendments, unless the accused is shown to have had the specific intent to teach and advocate the overthrow of the Government by force and violence and to bring such overthrow about as speedily as circumstances would permit (341 U. S. at 515-516). The petitioners say that the specific intent thus required is one

that has a constitutional function to perform, i.e., to take the place of the notice or warning which a standard of guilt—particularly one that is restrictive of First Amendment freedoms—must give an accused in order to support the application to him of a statute aimed at the restriction of speech. They further say that the required intent can perform that function only if it is shown to have been *personally and actually* entertained by the accused. Such a showing, they maintain, can be made only by evidence of his own acts and declarations or those of third persons which he has actually authorized or knowingly adopted or ratified.* The trial judge's instructions, as we have said, authorized the jury to base their finding of intent on the basis of third party acts and declarations *not* authorized or ratified by petitioners. Hence, the verdict cannot be said to constitute a valid finding of the intent necessary to a constitutional application of the Smith Act to these petitioners.

The Court of Appeals held that proof of an accused's intent to teach and advocate violent overthrow of the Government and to bring such overthrow about is not necessary to a constitutional application of the Smith Act (A. App. 190-191). Hence it sustained the trial judge's instructions as given to the jury and his refusal to give the instruction requested by petitioners (A. App. 191-196). The Court below was in error. For the opinion of the Chief Justice in *Dennis* makes it clear that the intent which has to be shown to support the application of the Smith Act to an accused, is a matter not only of statutory, but of constitutional requirement (341 U. S. at 515-516). And such an intent, as we have said, may be shown only by evidence of the accused's own acts and declarations or those of third

* We show *infra* at pp. 22 to 30 why this must be so in a case such as this, where the standard of guilt, because of its vagueness, may be constitutionally applied only if the accused is shown to have had such an evil state of mind as to relieve the standard of "the objection that it punishes without warning an offense of which the accused was unaware." Cf. *Screws* v. *United States*, 325 U. S. 91, 101-102.

persons which he has actually authorized or knowingly adopted or ratified. For were it otherwise, it would open the door to a dragnet application of the Act. Our meaning is this:

The charge in this case of conspiracy to teach and advocate the proscribed doctrine is predicated on the premise that petitioners are adherents of the principles of Marxism-Leninism; that these principles teach and advocate the duty and necessity of overthrowing and destroying the Government of the United States by force and violence; and that petitioners, by their adherence to Marxism-Leninism, have made such teaching and advocacy their own. The petitioners dispute this prosecution version of Marxism-Leninism. They maintain that it contains no such teaching or advocacy. Indeed, they say that as Marxism-Leninism has evolved and developed since 1935, and more particularly since the end of World War II, it teaches and advocates, and the Communist movement both here and abroad teaches and advocates, that in countries which provide channels for the peaceful expression and effectuation of the popular will, the working class and its allies can and should seek to win governmental power by peaceful means. They point to the fact that even the *pre-1935* teaching and advocacy of Marxism-Leninism and of the Communist Party of the United States were regarded by this Court as reasonably susceptible of the interpretation that they "desired to achieve (their) purpose by peaceful and democratic means." Witness the following from *Schneiderman* v. *United States,* 320 U. S. 118, 157:

> "A tenable conclusion from the foregoing (i.e., Marxist-Leninist writings) is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as

> a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open."

Certainly, in view of the developments in Marxist-Leninist theory since 1935, less cannot be said today. At worst, then, Marxism-Leninism may be said to be susceptible of two interpretations, one reprehensible and the other not. Hence, unless inquiry into the intent of an adherent of Marxism-Leninism is limited to an inquiry into his own acts and declarations and those of third persons which he has actually authorized, or knowingly adopted or ratified, a reprehensible intent may be imputed to him, notwithstanding that his own understanding of Marxism-Leninism and his intent in the teaching and advocacy thereof contemplate the achievement of its purposes only by peaceful and democratic means.

In *Dennis* a majority of the Court held that the First Amendment protects *all* speech up to the point that it creates a clear and present danger of substantive evil. Hence it was held that the Smith Act could be constitutionally applied to the utterances there involved only if they created a clear and present danger of the evil apprehended therefrom, i.e., an attempt at the overthrow of the Government of the United States by force and violence (341 U. S. at 514). Until *Dennis* was decided, the standard by which the existence of clear and present danger was measured was that first stated by Mr. Justice HOLMES in *Schenck* v. *United States*, 249 U. S. 49, 52:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

The opinion of Chief Justice VINSON in *Dennis*, which is hereinafter referred to as the plurality opinion, substituted for the *Schenck* standard the following (341 U. S. at 510):

> "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

The Chief Justice frankly acknowledged that the foregoing is a standard that is "indeterminate" and "subject to criticism on the score of indefiniteness" (341 U. S. at 515-516). If he nevertheless held that, as applied to the *Dennis* defendants, it did not contravene the First and Fifth Amendments by reason of its vagueness, it was because he thought that they fell within a category which he described as follows (341 U. S. at 516):

> "We think it (i.e., the standard of clear and present danger as defined in *Dennis*) will serve to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go—a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place will well appreciate and understand."

The opinion made it clear, however, that the standard could be applied to an accused, consistently with the requirements of the First and Fifth Amendments, only if, among other things, he was shown to have had the specific intent to bring about the substantive evil that Congress sought to prevent. For it declared (341 U. S. at 516):

> "*Where there is doubt as to the intent of the defendants,* the nature of their activities, or their power to bring about the evil, *this Court will review the convictions with the scrupulous care demanded by our Constitution.*" (Emphasis added.)

That a standard of "gravity of the 'evil', discounted by its improbability" is too vague to provide the boundary of permissible speech under the First Amendment or to give "fair notice of what to avoid" under the Fifth Amendment (Mr. Justice FRANKFURTER, dissenting, in *Winters* v. *New York*, 333 U. S. 507, 524), except, possibly, to those who *actually* entertain the intent to bring about the substantive evil that Congress sought to prevent, would seem almost too clear for argument. Justices FRANKFURTER and JACKSON bespoke the difficulties that inhere in the standard, even as it was applied in *Dennis*. Thus Mr. Justice FRANKFURTER said (341 U. S. at 551):

> "To make validity of legislation depend on judicial reading of events still in the womb of time—a forecast, that is, of the outcome of forces at best appreciated only with the knowledge of the topmost secrets of nations—is to charge the judiciary with duties beyond its equipment. We do not expect courts to pronounce historic verdicts on by-gone events. Even historians have conflicting views to this day on the origin and conduct of the French Revolution. It is as absurd to be confident that we can measure the present clash of forces and their outcome as to ask us to read history still enveloped in clouds of controversy."

And Mr. Justice JACKSON wrote (341 U. S. at 570):

> "If we must decide that this Act and its application are constitutional only if we are convinced that petitioners' conduct creates a 'clear and present danger' of violent overthrow, we must appraise imponderables, including international and national phenomena which baffle the best informed foreign offices and our own most experienced politicians. We would have to foresee and predict the effectiveness of Communist propaganda, opportunities for infiltration, whether and when a time will come that they consider propitious

for action, and whether and how fast our existing government will deteriorate. And we would have to speculate as to whether an approaching Communist coup would not be anticipated by a nationalistic fascist movement. No doctrine can be sound whose application requires us to make a prophecy of that sort in the guise of a legal decision. The judicial process simply is not adequate to a trial of such far-flung issues. The answers given would reflect our own political predilections and nothing more."

If these are the difficulties with which the plurality's clear and present danger standard confronts judges, what shall we say of the problems it poses to the citizen? It obviously provides him with no guides to the determination of what the scope of his freedom to speak is. Nor does it give him "fair notice of what to avoid," which is "included in the conception of 'due process of law'" (Mr. Justice FRANKFURTER, dissenting, in *Winters* v. *New York*, 333 U. S. 507, 524). For it says nothing as to what degree of probability of occurrence of the substantive evil will justify invasion of his freedom to speak, nor does it tell him how the necessary (albeit unspecified) degree of probability is to be ascertained, or how it will be determined.* Indeed, the plurality opinion says that he is not to be supplied with this knowledge even when called upon to defend himself against the charge that he has transgressed the boundary of permissible speech. For it says that these

* That *degree* of probability must determine the justifiability of the invasions of free speech, is made clear by the creator of the plurality's clear and present danger standard, Judge LEARNED HAND, who said at one point in his opinion for the Court of Appeals for the Second Circuit, in *United States* v. *Dennis*, 2 Cir., 183 F. 2d 201, 213: "We need not say that even so thoroughly planned and so extensive a confederation would be a 'present danger' at all times and in all circumstances; the question is how imminent: That is, *how* probable of execution—it was in the summer of 1948, when the indictment was found." At page 215 of his opinion Judge HAND wrote: "As we have said, 'clear and present danger' depends upon whether the mischief of the repression is greater than the gravity of the evil, discounted by its improbability; *and it is of course true that the degree of probability that the utterance will bring about the evil is a question of fact.*" (Emphasis added.)

questions are to be decided not by the jury, but by the trial judge, *as a matter of law and without hearing any evidence thereon* (341 U. S. at 511-514).

Unless the plurality standard is limited to those who possess the actual intent to bring about the substantive evil it must inevitably operate as a deterrent to the exercise of constitutionally protected activities.* After all, clear and present danger as the plurality opinion defined it is not a standard aimed only at Communists or at the teaching and advocacy of the forcible and violent overthrow of Government. It is a *general* standard. It applies to *all* men. And if men, regardless of their actual, personal intent, must guess at their peril whether their speech will be regarded as creating a degree of probability of substantive evil sufficient to justify invasion of their freedom to speak, they will not speak. Indeed, it is more than doubtful that men will not be deterred from speaking even when an evil intent is required (Cf. Mr. Justice FRANKFURTER, concurring, in *Dennis*, 341 U. S. at 549).**

It would therefore seem clear that the Court of Appeals was in error when it held that proof of an accused's evil intent is not essential to a constitutional application of the statute to him (A. App. 190).

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* What we say as to the deterrent effect of the standard, would be true even if it were limited in its application to the teaching and advocacy of forcible and violent overthrow of government. For men can never be sure that their peaceful utterances may not be regarded as violent ones. Witness the fact that in the *Dennis* case the Communist Party was held to teach and advocate forcible and violent overthrow of the Government on the basis of writings of which this Court had previously said in *Schneiderman* v. *United States*, 320 U. S. 118, 157: "A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party has obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open."

** In the *New York Times*, Magazine Section, February 15, 1953, Mr. Arthur Hays Sulzberger, publisher of that newspaper, wrote: "There has been dropped upon utterance and ideas a smokescreen of intimidation that dims essential talk and essential thought." Does this not suggest that the Court ought to revisit *Dennis* (*West Va. State Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 630; *Helvering* v. *Griffiths*, 318 U. S. 371, 401, note 52)?

Which brings us to the central question under this point, namely: If the plurality standard of clear and present danger may be applied to an accused only when he is shown to have had a specific evil intent, how must such intent be proved?

The question arises because the trial judge refused to instruct the jury, as the petitioners requested him to do, that "the acts or statements of some other member of the conspiracy not made with the actual knowledg or the prior request or authorization of a defendant may not be considered in determination of that defendant's personal intent" (Vol. IX, Doc. No. 284, p. 9), and because his instructions, as given, to which petitioners made timely objection, permitted "the declarations and statements of non-defendants or of co-defendants not authorized or ratified by the particular defendant, to be considered as evidence of that defendant's intent" (Vol. IX, Doc. No. 284, p. 10).*

In order that it may be made clear why the instruction requested by the petitioners was constitutionally necessary

* The portion of the instructions to which petitioners made the above objection reads as follows (A. App. 142):

> "As I have told you, you must be satisfied beyond a reasonable doubt that the defendants wilfully conspired, during the period beginning not earlier than May 1945 and ending on June 20, 1951, to accomplish the objective charged in the indictment which I have previously mentioned. The evidence which has been received relating to the period prior to the alleged conspiracy should be considered by you only in determining the intent of the defendants concerned. You may not consider such evidence in determining the intent of any other defendant to commit the offense charged unless you find that the statement or act concerned was made or done by the direction or authority or with the approval of such other defendant. *All of the rest of the evidence in the case, however, you may consider against all of the defendants* except as I have just instructed you, in determining the question of the initial participation of a particular defendant in the alleged conspiracy you cannot consider statements and declarations alleged to have been made by persons other than that defendant." (Emphasis added.)

The objection which petitioners made to the foregoing reads as follows (Vol. IX, Doc. 284, p. 10):

> "That portion of this instruction beginning, 'All the rest of the evidence' permits the jury to consider all evidence in the period May 1945 and thereafter against all defendants and on the question of intent. It thus permits the declarations and statements of non-defendants or of co-defendants not authorized or ratified by the particular defendant, to be considered as evidence of that defendant's intent."

and why the instruction as given resulted in an unconstitutional application of the statute to them, it is necessary to say the following:

In *Screws* v. *United States,* 325 U. S. 91, 101, the Court said:

> "The constitutional vice in such a statute (i.e., a vague and indefinite criminal statute) is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. * * * But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."

Since, as the Court said in *Screws, supra,* the requirement of a specific evil purpose or intent may "relieve [a vague and indefinite] statute of the [constitutional] objection that it punishes without warning an offense of which the accused was unaware," it is clear that the function of such an intent is a *constitutional* one. For when such a purpose or intent is proved, it will be deemed to supply or compensate for the constitutional ingredient of notice and warning which the standard of guilt lacks.*

Now, it would seem to be equally clear that if a vague and indefinite standard of guilt may be cured by the accused's evil state of mind, the state of mind that must be proved is one that *he himself* has *actually* possessed, and

* Cf. plurality opinion in *Dennis,* 341 U. S. at 515-516.

one that is deduced or inferred from facts which are rationally *probative* of an individual's mental state. For the function which the accused's state of mind must perform is to fill the gap in the standard of guilt. That is to say, his *actual* state of mind must be such that he needs no *warning* from the standard. To permit anything else to sustain a conviction under a vague standard of guilt, is to make a mockery of the principle that only an evil state of mind may compensate constitutionally for the lack of warning in the standard. *For then the accused may be convicted although he has had neither warning from the standard nor a state of mind that makes warning to him constitutionally unnecessary.*

What is required in this respect was clearly expressed by the Court in *American Communications Asso.* v. *Douds*, 339 U. S. 382, 413, in these words:

> "And since the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning, *the fact that punishment is restricted to acts done with knowledge that they contravene the statute makes this objection untenable.* As this Court pointed out in United States v. Ragen, 314 U. S. 513, 524 (1942), *'A mind intent upon willful evasion is inconsistent with surprised innocence.'* " (Emphasis added.)

To speak, in this context, of an accused's "knowledge" and of "a mind intent upon willful evasion", is to speak of a state of mind *actually* possessed by the accused. For as Mr. Justice HOLMES said in his *The Common Law*, 56, *"The question of knowledge is a question of the actual condition of the defendant's consciousness."* How is the actual condition of a man's consciousness proved? In the *Douds* case, *supra*, 339 U. S. at 411, Chief Justice VINSON, writing for the Court, said that "the state of a man's

mind must be inferred from the things he says or does." It cannot be inferred from the acts or declarations of anyone else, unless he has actually authorized or ratified such acts and declarations. For nothing that one man says or does can ever be evidence of another man's state of mind, unless the latter has actually authorized it or, with knowledge thereof, has adopted or ratified it. And this is true regardless of what the relationship between the two men is. For if an *actual* evil state of mind on the part of an accused is necessary in order to give constitutional validity to the application to him of a vague and indefinite criminal standard, the acts and declarations of co-conspirators, even when made in the course of the conspiracy and in furtherance of its objects, are no more evidentiary of the accused's state of mind than are those of any other third person, unless the accused has actually authorized or ratified them.

An examination into the theory on which, in the ordinary conspiracy case, one conspirator's acts and declarations may be considered by the jury in determining the guilt of another, will demonstrate that not even in such a case are the co-conspirator's acts and declarations regarded by the law as *evidentiary* of the accused's state of mind. To begin with, conspirators are regarded in the law as agents of one another in the prosecution of the common enterprise (*Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249). Hence, "the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them", under the general rule that the act of the agent in the course of his employment and within the scope of his authority is the act of his principal (*Hitchman Coal & Coke Co.* v. *Mitchell*, *supra*, at 249). This rule, as Mr. Justice HOLMES said in his *Collected Legal Papers*, 49, rests upon the "fiction • • • that, within the scope of the agency, principal and agent are one." And the fiction obtains in the criminal, as well as in the civil, law. Witness the Court's use of it in its

most recent exposition, in *Lutwak* v. *United States*, 344 U. S. 604, 617, of the theory on which the declarations of one conspirator may be used against another:

> "Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other and *the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party.*" (Emphasis added.)

The acts, declarations and knowledge of one conspirator, done, made and acquired in furtherance of the objects of the conspiracy, are considered against his co-conspirators on the same theory that the acts, declarations and knowledge of an attorney are ordinarily considered against his client (*In re Locust Building Co., supra*, C. C. A. 2, 299 Fed. 756, 769, cert. den., sub. nom., *Keighly* v. *American Trust Co.*, 265 U. S. 590), i.e., "that within the scope of the agency, principal and agent are one" (HOLMES, *supra, Collected Legal Papers*, 49). This theory does not, however, rest on or contain within itself any notion that the acts or declarations of an agent are *evidence of the principal's state of mind* (Mechem, *The Law of Agency*, 2d ed., §1803, p. 1384).

Acts and declarations of an agent or conspirator are considered against the principal or co-conspirator *not* because they are *evidentiary* of the state of mind of the principal or co-conspirator, but because the latter is, under substantive law, *chargeable* with them. Thus, Professor Thayer said in 15 *American Law Review*, 81, "the rule which says that a man should be charged with the acts and declarations of his agent or fellow co-conspirator is not a rule of evidence." And Judge LEARNED HAND said the same when, in *Van Riper* v. *United States*, C. C. A. 2, 13 F. 2d 961, 967, cert. den., sub. nom., *Ackerson* v. *United States*, 273 U. S. 702, he wrote on behalf of the Court:

> "Such declarations (of co-conspirators) are admitted upon no doctrine of the law of evidence, but of the substantive law of crime. When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime'. What one does pursuant to their common purpose all do, and as declarations may be such acts, they are competent against all."

Wherever we look, whether to text writers or to court decisions, we find that, underlying the imputation of an agent's or conspirator's acts and declarations to his principal or co-conspirators, is the "fiction that, within the scope of the agency, principal and agent are one" (HOLMES, *supra, Collected Legal Papers,* 49). The acts and declarations of the agent or conspirator are treated *as if* they were done and made by the principal or co-conspirator (Wigmore, 4 *Evidence,* §1078, p. 119).

Thus in *United States* v. *Gooding,* 12 Wheat (U. S.) 460, Mr. Justice STORY, writing for an unanimous Court, said at p. 469: " * * * [T]he act of one conspirator, in the prosecution of the enterprise, is *considered* the act of all, and is evidence against all. Each is *deemed* to consent to, or command, what is done by any other in furtherance of the common object." (Emphasis added.) So, too, in *Sundry Goods* v. *United States,* 2 Pet. (U. S.) 358, a case in which the Government filed a libel praying that certain goods seized be deemed forfeited and disposed of according to law, where the owner of the goods complained that transactions and declarations of his agent had been erroneously received in evidence against him, the Court relying upon the decision in *Gooding, supra,* said, at 364, that, "whatever an agent does, or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case; in like manner *as if* the evidence applied personally to the principal." (Emphasis added.)

That a conspirator's acts and declarations are *not* received and considered against his co-conspirators on the

theory that they constitute evidence of the mental state of the co-conspirators, is conclusively established by the fact that such acts and declarations are receivable against and chargeable to the co-conspirators *even though they may have been done and made long before the latter joined the conspiracy and never became known to the co-conspirators.** Thus did Judge LEARNED HAND, writing for the Court, say in *Van Riper* v. *United States, supra,* 2 Cir., 13 F. 2d 961, 967, cert. den., sub. nom., *Ackerson* v. *United States,* 273 U. S. 702: "[I]t is also a part of the law of joint crimes that when a party joins an existing group already so engaged, he *assumes responsibility* for all that has been done theretofore. * * * *For this reason* all that was done before he entered may be used against him * * *." (Emphasis added.)

The Court below refused to recognize that proof of evil intent was constitutionally required in this case. But it held that even if it was, acts and declarations of co-conspirators might be considered by the jury, even though they had not been actually authorized or knowingly ratified by petitioners. In this, as we have shown, it erred. The rule which permits of the use of third party declarations even in a run-of-the-mine conspiracy case has been trenchantly criticized.** This Court has acknowledged the cogency of

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* The statement in cases such as *Pinkerton* v. *United States,* 328 U. S. 640, 647 and *Wiborg* v. *United States,* 163 U. S. 632, 657, 658, that "motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective" do not contradict the thesis of the cases cited above. The context in which the statement appears in each of these cases shows that all that the Court intended to say was that since the act or declaration of one conspirator is treated in the law *as if* it had been done or made by all, an act or declaration by one conspirator indicative of the motive or intent of the conspiracy is *deemed* to have been made by all and is, therefore, usable against all.

** In *Pinkerton* v. *United States, supra,* 328 U. S. 640, 650, Mr. Justice RUTLEDGE dissenting, said: "The looseness with which the charge (of conspiracy) may be proved, the almost unlimited scope of vicarious responsibility for others' acts which follows once agreement is shown, the psychological advantage of such trials for securing convictions by attributing to one proof against another, these and other inducements require that the broad limits of discretion allowed to prosecuting officers in relation to such charges and trials be not expanded into new, wider and more dubious areas of choice."

that criticism. For in *Krulewitch* v. *United States,* 336 U. S. 440, 443, it said: "There are many logical and practical reasons that could be advanced against a special evidentiary rule that permits out-of-court statements of one conspirator to be used against another." And while it felt constrained to add that "however cogent these reasons, it is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements are admissible as exceptions to the hearsay rule," it clearly expressed its determination not "to expand this narrow exception to the hearsay rule" to new areas (336 U. S. at 443-444). To sanction its use in the determination of the intent which had to be shown in this case, demands an expansion thereof to the point where it collides with the Constitution. Intent here had to be proved not only as a matter of statutory requirement, but to give constitutional vitality to a vague and indefinite standard of guilt. As we have shown, only an intent *personally and actually possessed* by the accused can perform that function. To regard the acts and declarations of a co-conspirator, which have not been actually authorized or ratified by the accused, as an agreeable substitute, is to do violence to the requirements of due process of law. For, as we have said, this would permit of the conviction of an accused notwithstanding that he has had neither warning from the standard of "what to avoid", nor a state of mind that would make warning to him constitutionally unnecessary. Certainly, it is not too much to say that the "special evidentiary rule that permits out-of-court statements of one conspirator to be used against another"—"this narrow exception to the hearsay rule"—must find its limits in the constitutional requirement of due process of law.

The Court below laid stress on the fact that the trial judge repeatedly impressed upon the jurors the fact that guilt was personal, and that they had to find that the

individual intent of each petitioner was to overthrow the Government by force and violence. This is not responsive to the petitioners' complaint. What they complain of is that the trial judge authorized the jury to predicate their finding of the requisite specific intent on evidence that was not rationally probative thereof, i.e., on acts and declarations of alleged co-conspirators which were not shown to have been actually authorized by each petitioner or actually known to and ratified by him. It cannot, therefore, matter how often the trial judge instructed the jury that they had to find that the individual intent of each petitioner was to overthrow the Government by force and violence, for an erroneous authorization to the jury to predicate their finding of an accused's intent on the acts and declarations of *others* will vitiate their verdict (*Kotteakos* v. *United States,* 328 U. S. 750, 770-771).

The bulk of the evidence which the trial judge authorized the jury to consider in determining the specific intent of each petitioner, consisted of innumerable declarations of third parties which were not shown to have been actually authorized or actually known to and ratified by the petitioner. The number of such declarations runs literally into the dozens. Hence, if the trial judge erred in authorizing the jury to consider such evidence against the various petitioners, it is clear that his error cannot be dismissed as harmless. The erroneous admission of a *single* declaration in a case where the "record fairly shrieks the guilt of the parties" may sometimes be thought harmless (*Lutwak* v. *United States,* 344 U. S. at 619), although there are instances where the erroneous admission of even one declaration will constitute reversible error (*Krulewitch* v. *United States,* 336 U. S. 440, 444-445). Where, however, the number of alleged conspirators is as great as it was here (*Kotteakos* v. *United States,* 328 U. S. 750, 766), and the number of declarations which the court improperly per-

mitted the jury to consider on the question of specific intent are as multitudinous as they were here,* it would seem clear that the error affects substantial rights, and that the judgment of conviction must, therefore, be reversed (*Kotteakos* v. *United States, supra,* 328 U. S. 750, 770).

By authorizing the jury to consider third party acts and declarations as evidence of each petitioner's intent to cause the overthrow of the Government by force and violence—without requiring that they first find that such acts and declarations had been actually authorized or actually known to and ratified by such petitioner—the trial judge's charge committed what, under our system of law, is a cardinal error. "Guilt with us remains individual and personal, even as respects conspiracies" (*Kotteakos* v. *United States, supra,* 328 U. S. 750, 772). "[E]xtraordinary precaution is required not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually, as far as possible, from loss of identity in the mass. Indeed, the instructions often become, in such cases, his principal protection against unwarranted imputation of guilt from others' conduct" (*Kotteakos* v. *United States, supra,* 776-777). Here the necessity for proof of *personal guilt* was underscored by the requirement that each petitioner be shown to have *actually* entertained the specific intent to teach and advocate violent overthrow of the Government and to bring such overthrow about, in order to make application of the Smith Act to him constitutional. It is true the trial judge told the jury that a finding by them of such specific intent on the part of each

* Third party declarations which the trial judge so authorized the jury to consider included those which appear in the appendix record (Appendix to Appellants' Brief in the Court of Appeals) at pp. 61-70; 73-81; 83; 84-85; 85-86; 87-88; 89; 91; 92; 94-95; 96; 97; and those which appear in the typewritten transcript at the following pages: Tr. 2056-2057; 3858; 4274; 4350; 4443-4446; 4450-4455; 4456-4458; 4459-4461; 4462-4463; 4465-4467; 4468-4471; 4473-4474; 6582-6583; 6602-6604; 6628-6629; 7200; 7230; 7234-7235; 7271; 7612-7613; 8232-8233; 8330-8331; 8349; 8392-8393; 8410; 8432-8434; 8434-8436; 8439.

petitioner was necessary to a finding of his guilt. But he nullified this when he also charged them that they could consider the acts and declarations of others as evidence of each petitioner's specific intent, regardless of whether the petitioner was shown to have actually authorized or to have actually known of and ratified such acts and declarations. For in this wise, the trial judge authorized the jury to predicate each petitioner's guilt not on his own intent, but on the intent of others, which is guilt by association in its most virulent form.

II

Neither the evidence adduced at the trial nor the facts judicially noticed by the trial judge showed the existence of the clear and present danger, as defined in *Dennis*, which is necessary to the constitutional application of the Smith Act.

In the case at bar, the clear and present danger rule has been so far diluted, that virtually nothing remains of it, save its name. For in response to the contention of the petitioners that there was no probability, at the time of their indictment, that their teaching and advocacy would result in the substantive evil of attempted overthrow of the Government, the Court of Appeals said (A. App. 204):

> "Where a conspiracy to destroy the Government by force or violence is involved,* we think that the 'clear and present danger' concept, as defined in *Dennis* (183 F. 2d at p. 212, 341 U. S. at p. 510), connotes no more than that the setting in which the defendants have

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* This case does not, of course, involve "a conspiracy to destroy the Government by force or violence." It involves a conspiracy to *teach and advocate* such overthrow, and no more.

conspired is such as to lead reasonably to the conclusion that their teachings may result in an attempt at overthrow."

If we understand this language aright, it means that the mere *possibility* "that (petitioners') teachings may result in an attempt at overthrow" is sufficient to support the application of the Smith Act to them. It is a rejection of *probability* as the measure of constitutional application. Indeed, it is a repudiation, in all but name, of "clear and present danger" as the standard of guilt. If we are right in this, the decision of the court below cannot stand, for it runs counter not only to all the decisions of this Court which preceded *Dennis*, but to *Dennis* itself.

However, even if the court below intended no more than a restatement in its own words of the clear and present danger rule as enunciated in *Dennis*, its decision cannot stand, because it erroneously rejected petitioners' contention, based on incontrovertible evidence, that there was no probability, at the time of their indictment, that their teaching and advocacy would result in an attempt at the overthrow of the Government.* The importance of this question in the application of the Smith Act to members and officers of the Communist Party is obvious. For if petitioners' contention is valid, there is no basis for the many pending and contemplated prosecutions of Communists under that Act.

The theory of the prosecution, as stated by Government counsel in his summation to the jury, was that "the time at which these defendants and their co-conspirators will attempt to seize power by forcibly overthrowing our existing government is a time of national crisis * * * such as a severe economic depression or a war" (Tr. 15429). "[T]hey teach that the revolution will come when a revo-

* This contention and the evidence relied on to support it are presented for the first time in this case. They were not presented in either the *Dennis* case or in *United States* v. *Frankfeld*, 4 Cir., 198 F. 2d 679, cert. den., 344 U. S. 922.

lutionary situation exists. They are preparing the subjective conditions themselves, that is, the ability of what they call the politically conscious workers to drop, to topple over the capitalist state as soon as the objective conditions come about: Economic depression, war—they will lead the revolution" (Tr. 15431).

The trial judge adopted the prosecution's theory. Since there was nothing to indicate the probability of economic depression he predicated his finding of clear and present danger on the probability of war. For in explanation of that finding he said (Tr. 13671-13673):

> "Your motion to submit the question of clear and present danger to the jury is denied. I consider that I have sufficient before me in the record and in the material of which I am entitled to take judicial notice to make the determination of clear and present danger, but for your benefit I will be glad to advise you what the facts are of which I am taking judicial notice.
>
> "They are, in substance, those of which Judge Hand and the United States Supreme Court took judicial notice, brought up to date.
>
> "Supplementing the facts of which there is evidence, I take judicial notice that on June 20, 1951, when the indictment was found, Russia, by far the most powerful of European nations, had been a convert to communism for over 30 years; its leaders were the most devoted and potent proponents of the faith; no such movement in Europe of East to West had arisen since Islam. In most of West Europe there were important political Communist factions, always agitating to increase their power. In Asia the Chinese Nationalist Government had been driven out by the Communists whose government had overrun the government of Tibet and was supporting with men and munitions the North Korean side of a war where the opposing South

Korean side was supported by an army of the United Nations, of which the United States was the principal supporter. Communists were fighting against the English in Malaya and the French in Indo-China. The status quo hastily contrived in 1945, was showing strains and tensions, not originally expected. The situation in Berlin had not improved since the airlift had saved Britain, France and the United States from being forced out, contrary to the United States Government's understanding of the convention by which we were there. The United States had become the object of invective upon invective; we were continuously charged with aggressive designs against other nations; our efforts to re-establish their economic stability were repeatedly set down as a scheme to enslave them; we had been singled out as the chief enemy of the faith; we were the eventually doomed, but the still formidable protagonist of that decadent system which it was to supplant. Any border fray, any diplomatic incident, any difference in construction of the modus vivendi—such as the Berlin blockade which we have just mentioned—might prove a spark in the tinder-box, and lead to war of survival in extension of or in addition to the war in which we were engaged in Korea."

There is no evidence, either in or outside the record, that the principles of Marxism-Leninism, or that the Communist Party or any of its officers or members, ever taught that war or severe economic depression would alone provide the occasion for the attempted overthrow of *any* government. The petitioners showed, on the contrary, by evidence that is incontrovertible, that even if it could be said that the principles of Marxism-Leninism and the Communist movement teach and advocate the forcible and violent overthrow of government in *some* circumstances, they

do not teach or advocate that either severe economic depression or war *alone* will provide the occasion for such an undertaking.* On the contrary, under Marxist-Leninist theory, revolution, whether peaceful or otherwise, is not something that depends on any one event such as economic depression or war, even when the war is one which Communists regard as an imperialist war. The prerequisite to revolution is a *revolutionary situation,* which comprehends a host of precisely defined objective factors that are altogether independent of the will of parties and even of whole classes. Moreover, not every revolutionary situation leads to revolution. For in addition to the objective factors which Marxism-Leninism regards as necessary to a revolutionary situation, there must also be present those factors which the theory denominates as "subjective", i.e., "the ability of the revolutionary classes to carry out revolutionary mass actions strong enough to break or to undermine the old government."

Lenin made all this quite explicit in a series of articles and speeches from which extensive quotations are to be found in the Appendix to this Petition at pages 85-94 and 144-145. The subjective and objective conditions which they specify as indispensable prerequisites to the revolutionary overthrow of even the most tyrannical of governments may be summarized as follows: That the party which leads the revolution should "enjoy the sympathy of the majority of the people, as proved by definite facts"; that "the development of events in the revolution has * * * led to the virtual dissipation of the illusions of compromise entertained by the petty bourgeoisie"; that "in the army in time of war sentiments hostile to a government which

* Indeed, petitioners adduced evidence to show that the doctrines of Marxism-Leninism, as they have evolved and developed since the Nazis came to power in Germany in 1933, teach and advocate that in countries which provide channels for the peaceful expression and effectuation of the popular will, the working class and its allies can and should seek to win governmental power by peaceful means.

drags out an unjust war against the will of the people have * * * become fully matured"; that "the advanced workers are * * * convinced of the desperate situation of the masses and of the support of the countryside, as demonstrated by an energetic peasant movement, or by a revolt against the landlords and against the government that defends the landlords"; that "the economic situation in the country offers (no) real hope of a favorable solution of the crisis by peaceful and parliamentary means" (6 Lenin, *Selected Works,* p. 321-322; DE NNN 6 id; quoted in *Schneiderman* v. *United States,* 320 U. S. 118, 156, note 51); that the "revolutionary party has * * * a majority among the front ranks of the revolutionary classes and in the country generally"; that "the old government * * * shall have reached a stage of complete moral and political bankruptcy" (6 Lenin, *Selected Works,* p. 293; DE NNN 6 id.); the "impossibility for the ruling classes to maintain their power unchanged"; "a crisis in the policy of the ruling class"; "the wants and sufferings of the oppressed classes become more acute than usual"; "a considerable increase in the activity of the masses who in 'peace time' allow themselves to be robbed without protest, but in stormy times are drawn both by the circumstances of the crises and by the 'higher-ups' themselves into independent historic action"; "the ability of the revolutionary classes to carry out revolutionary mass actions strong enough to break or to undermine the old government" (18 Lenin, *Collected Works,* pp. 279-280; DE 4 x H).

Above all must it be appreciated that nothing of Marxism-Leninism can be understood unless it is grasped that at the heart thereof lies the concept which Lenin expressed over and over again, namely, that: "In order to obtain the power of state the class conscious workers must win the majority to their side" (6 Lenin, *Selected Works,* 29; DE NNN 6-C). "[W]e do not want to 'usurp' power, for the whole experience of revolution teaches that only a

power that is backed by the majority of the people can be durable" (Lenin, *War and the Workers,* 29; DE OOO 24-A).

That Marxism-Leninism does *not* teach that war—even one which Communists regard as an imperialist war—can alone provide the occasion for governmental overthrow, is conclusively shown by the following quotation from a speech made by Lenin at a Party conference held in May, 1917, during World War I (6 Lenin, *Selected Works,* 95; DE NNN 6 id):

> "*Some may ask*: *Have we not repudiated our own principles? We advocated the transformation of the imperialist war into a civil war—are we not going back on ourselves?* But the first civil war in Russia has ended; we are now passing to a second war—a war between imperialism and the armed people. In this transitional period, as long as the armed force is in the hands of the soldiers, *as long as Milyukov and Guchkov have not resorted to violence, this civil war, as far as we are concerned, turns into peaceful, prolonged, and patient class propaganda.* If we speak of civil war before people have come to realize its necessity, we shall certainly be guilty of Blanquism. We are for civil war, but only when it is waged by a class conscious of itself. *Only he who is known to the people as a despot can be overthrown.* But there are no despots now: the guns and rifles are in the hands of the soldiers, and not the capitalists; the capitalists are getting their way now not by violence, but by fraud. To cry out against violence now is nonsense. *One must be able to regard matters from the Marxist standpoint, which says that the transformation of the imperialist war into a civil war is based on objective and not on subjective factors.*" (Emphasis added.)

The upshot of all the foregoing is that the principles of Marxism-Leninism *expressly prohibit and exclude* all attempts at the violent overthrow of any government, even of one which has closed all constitutional and peaceful channels for the expression of the popular will, unless and until the many subjective and objective factors, in addition to imperialist war or severe economic depression, exist. This is not only a theoretical principle. For the evidence referred to below shows that the Communist movement everywhere conforms its practice to this principle, in obedience to what is itself a fundamental principle of Marxism-Leninism, i.e., that there must be unity between theory and practice.*

It would therefore seem clear, and petitioners so argued in the Court below, that the answer to the question whether there was any probability that the petitioners and their alleged co-conspirators would attempt the overthrow of the Government would have to turn on the answers to *these* questions: (1) What circumstances, if any, did the petitioners and their alleged co-conspirators contemplate or teach as the circumstances in which an attempt at such overthrow might be made? (2) Was there a probability at the time of the indictment that such circumstances would occur?

The Court below rejected the argument, saying (A. App. 204):

> " * * * [T]he argument rests upon a misconception of what this Court and the Supreme Court have held as to the meaning of 'clear and present danger,' and as to

* Stalin, in his *Foundations of Leninism*, GE 4, p. 26, expressed the Marxist-Leninist requirement of unity of theory and practice in these terms: "Revolutionary theory is the generalization of the experiences of the labour movement in all countries. It naturally loses its very essence if it is not connected with revolutionary practice, just as practice gropes in the dark if its path is not illumined by revolutionary theory. But theory can become the greatest force in the labour movement if it is indissolubly bound up with revolutionary practice, for it alone can give to the movement confidence, guidance, strength and understanding of the inner relations between events; it alone can help practice to clarify the process and direction of class movements in the present and near future.

what the lower Court found in that respect. 'Clear and present danger' does not mean, as appellants' argument seems to suggest, that the trial Court must find that the alleged conspirators have agreed upon a precise set of circumstances under which they will attempt to strike down the Government, and, further, the existence or likely existence of those particular circumstances. In the very nature of things those who advocate the violent overthrow of the Government cannot themselves foresee the future so clearly as to forecast the particular conditions under which it may seem to them propitious to strike at the established authority. Indeed, the appellants themselves argue in connection with their assertion that Communism has cast aside its revolutionary doctrines that the Marxist-Leninist teachings are flexible enough so as to be adaptable to changing sets of circumstances."

With deference we submit that the foregoing does not answer petitioners' contention; it avoids it. The charge against these petitioners is that they were adherents of and agreed to teach and advocate the principles of Marxism-Leninism, which the Government contends include the teaching and advocacy of the overthrow of the Government of the United States by force and violence. Now, it would seem clear that if this body of theory teaches that an attempt at governmental overthrow may be made *only* when a host of specified conditions, both subjective and objective, concur—and expressly precludes and prohibits such an attempt in the absence of any of such conditions—the probability of an attempt at overthrow by the adherents of that theory can be said to exist only to the extent that there is a probability that the conditions prerequisite to such an attempt will arise. This must be so, unless there is ground for saying that the alleged conspirators did not really intend to make an attempt at overthrow dependent

on the occurrence of such conditions. For, in the absence of such ground, it is only on the basis of the agreement actually made by the alleged conspirators, that one can say whether or not there is any probability that they will act. Hence, if they have agreed to act *only* in the context of certain conditions and *not* to act in their absence, it is obvious that the probability of their acting *must* be measured by the probability of the occurrence of the conditions they have set for their acting.

The Court below rejected petitioners' contention on two grounds: (1) That "in the very nature of things those who advocate the violent overthrow of the Government cannot themselves foresee the future so clearly as to forecast the particular conditions under which it may seem to them propitious to strike at the established authority" (A. App. 204). (2) That the petitioners "themselves argue in connection with their assertion that Communism has cast aside its revolutionary doctrines that the Marxist-Leninist teachings are flexible enough so as to be adaptable to changing sets of circumstances" (A. App. 204).

The first of the aforementioned grounds has already been answered. If people have agreed to act only upon the occurrence of certain events—and there is nothing, as there is nothing here, to indicate that they intend to do other than act in accordance with their agreement—one cannot possibly disregard that agreement and assume that they will act contrary thereto on the *abstract theory* that "in the very nature of things those who advocate the violent overthrow of the Government cannot themselves foresee the future so clearly as to forecast the particular conditions under which it may seem to them propitious to strike at the established authority."

The conditions which Marxism-Leninism attaches to an attempt at governmental overthrow are founded on its study and interpretation of past history. (Cf. 18 Lenin, *Collected Works*, 279-280, DE 4 x H.) Marxism-Leninism

teaches that "the connection and interdependence of the phenomena of social life are laws of the development of society, and not something accidental"; that "hence social life, the history of society, ceases to be an agglomeration of 'accidents', and becomes the history of the development of society according to regular laws, and the study of history of society becomes a science"; and that "*hence the practical activity of the party of the proletariat must not be based on the good wishes of 'outstanding individuals', not on the dictates of 'reason', 'universal morals', etc., but on the laws of development of society and on the study of these laws*" (*History of the Communist Party of the Soviet Union*, 114; GE 9). For Marxist-Leninists, therefore, the conditions which their theory places upon an attempt at governmental overthrow express a law of social and historical development. It is, therefore, an utterly unwarranted assumption that they will depart from or violate it.

The second of the grounds on which the Court below rejected petitioners' contention was, that even if account is to be taken of the conditions which Marxism-Leninism defines as the prerequisites to an attempt at governmental overthrow, these conditions may be disregarded because petitioners "themselves argue in connection with their assertion that Communism has cast aside its revolutionary doctrines, that the Marxist-Leninist teachings are flexible enough so as to be adaptable to changing sets of circumstances." Marxism-Leninism has, indeed, taught and advocated, since the Nazis came to power in Germany in 1933, that in countries which provide channels for the peaceful expression and effectuation of the popular will, the working class and its allies can and should seek to win governmental power by peaceful means. But this development, far from presaging an abandonment or dilution of the teachings which prohibit an attempt at governmental overthrow except in the extreme conditions which they specify, necessarily implies an even firmer adherence to them. For if the

theory, as it has developed in recent years, envisages the possibility of the peaceful accession of the working class to governmental power, it necessarily follows that the restraints which the theory places upon violent overthrow must be observed at least to the same extent that they were in those countries, e.g., Russia, where peaceful accession to power was thought to be impossible.

It cannot be disputed that there was no probability, at the time of petitioners' indictment, of the occurrence in the United States of the conditions which Marxist-Leninism attaches to an attempt at governmental overthrow. It therefore follows, if we are right in what we have heretofore said, that there was no probability, at that time, that the petitioners and their alleged co-conspirators would attempt the overthrow of the Government. Indeed, the prosecution's cruelly emasculated version of Marxism-Leninism and of the teaching and advocacy of the Communist Party of the United States, i.e., that overthrow of the Government should be attempted "as soon as the objective conditions come about: economic depression, war", is to be explained only on the hypothesis that it was aware that it could not establish the probability of the occurrence of the many factors, subjective and objective, which under Marxism-Leninism are prerequisites to revolution.

The evidence which petitioners adduced in the Court of Appeals to support their contention that Marxism-Leninism does not permit of an attempt at governmental overthrow except in the extreme conditions which it specifies, was not confined to the written word. They showed, in addition, that in the United States and in those countries to which the trial judge made reference in his finding of a clear and present danger—Russia, France, Italy and China—Communist practice has always conformed to these teachings of Marxism-Leninism. The evidence which petitioners adduced in support of this showing was voluminous. We shall therefore summarize it in the briefest form here, respect-

fully suggesting that if the Court desires to examine the evidence as presented to the Court below it will find same in one of the briefs filed by petitioners in the Court of Appeals, which is submitted as an Appendix to this Petition, at pages 95-139. The evidence we refer to showed the following in respect to each of the countries named below:

France: The economic and financial plight of both the government and the overwhelming majority of the French people, since the end of World War II, has become an international byword. Only recently did France's 8-year war in Indo-China come to an end. It has been in a state of "perennial political crisis." It has had at least 18 changes of ministry in the 9 years that have elapsed since the end of World War II. During all this time the Communist Party of France has been "numerically the strongest party." In each national election it has polled at least 5,000,000 votes. Of the 627 deputies in the National Assembly, 101 are Communists. In addition, the Communists control France's largest labor organization, the Confederation Generale de Travail (CGT) (Appendix to this Petition, 98-101).

France is obviously a country which, to use the words of Judge LEARNED HAND in the *Dennis* case, 183 F. 2d at p. 213, has been "so far extended by foreign engagements, so far divided in counsel, (and) so far in industrial (and) financial straits", that if the theory of the prosecution and the trial judge had anything to commend it, we should have expected the Communists of France to have long since called for or attempted the violent overthrow of the government of France. But they have not done so. On the contrary, they have sought only a united front for the purpose of achieving "a government of moral purity and peace", "a stable government, a government of democratic unity relying on the confidence of the people" (Appendix to this Petition, 115-116).

Italy: The situation in Italy since the end of World War II has not been materially different from that in France. It has been described by Ugo La Malfa, Minister for Foreign Trade in the de Gasperi cabinet, as being "socially, economically and politically one of the 'borderline' countries where the battle between democracy and everything that is anti-democratic is a touch-and-go affair." Its "fundamental problem is still what it was at the time of national unification, a problem of glaring contrasts. The manifestations of a long-standing culture stand beside the evidences of long-lasting poverty." It has an acute unemployment problem which, it has been said, "predominates in Western Europe because of its size." Its trade deficit runs into the hundreds of millions of dollars, and its national budget "is expanding beyond the point of safety." In January, 1953, Mr. La Malfa summed up the Italian situation in these words: "It is a time of crisis, with all the dangers that the word connotes" (Appendix to this Petition, 106-110).

In the national election held in June, 1953, the Communist Party polled 6.1 million votes, which represented 22.6% of all the valid votes cast in the election. Of the 590 deputies elected in that year, 143 were Communists. In addition, the Communist Party of Italy, like that of France, enjoys great influence in the organized labor movement (Appendix to this Petition, 110). But the Communists of Italy have not called for the violent overthrow of the government of Italy. On the contrary, like the Communists of France, they have sought a governmental change only through the electoral process. Thus at a meeting of the National Council of the Communist Party of Italy, held as recently at April, 1953, its general secretary, Palmiro Togliatti, said in the course of a report on the then impending national election (Appendix to this Petition, 116):

"What we demand, and for this we address ourselves to the Italian electorate, is to achieve through the

medium of the election a situation which would permit the formation of a government capable of launching and of carrying through a great, incessant and effective struggle against poverty, against the growing privations of the worker, office employee, handicraftsman, peasant, against the economic degradation of Southern Italy and the islands, the mountain areas and other poorly developed areas."

China: In support of his finding of clear and present danger, the trial judge said that "in Asia the Chinese Nationalist Government had been driven out by the Communists" (*supra*, 34). Even if it were valid to assume, as the trial judge did, that when, in 1949, the Chinese Communists acceded to governmental power, they did so as a consequence of the violent overthrow of the Nationalist Government, it would not invalidate anything we have said concerning the teachings of Marxism-Leninism or the practices of Communist Parties under that theory. The evidence which petitioners laid before the Court of Appeals showed that for a quarter of a century prior to their accession to power, the Chinese Communists had sought by peaceful means to achieve a coalition government which would include both the Communists and the Kuomintang. In 1924 the Communist Party formed a united front with the Kuomintang which was disrupted in 1927. In 1937, on the initiative of the Communist Party, a united front was once again formed between the two parties, which also came to an end sometime prior to 1944. In the latter year the Communist Party once again proposed to the Kuomintang the setting up of a democratic, coalition government. But it refused. The Communists charged that their proposals for such a government were rejected because the Kuomintang Government "was unwilling not only to end the one-party rule and set up a coalition government but

also to effect any necessary democratic reforms." That the Nationalist Government of China "had always been a one-party rather than a democratic Government in the Western sense," was attested by our own State Department. (*United States Relations with China*, Department of State Publication 3573, August, 1949, p. VII.) Both the government and the Kuomintang which controlled it had, long before their disappearance from the stage in 1949, "sunk into corruption, into a scramble for place and power" (*ibid.*, p. VII), while they failed to provide the people "with enough to eat" (*ibid.*, p. V). In consequence, "the mass of the Chinese people were coming more and more to lose confidence in the Government" (*ibid.*, p. VII). "The fact was that the decay which our observers had detected in Chungking early in the war had fatally sapped the powers of resistance of the Kuomintang. Its leaders had proved incapable of meeting the crisis confronting them, its troops had lost the will to fight, and its Government had lost popular support" (*ibid.*, p. XIV). In summarizing the conditions which brought the Communists to power in China, the Department of State said (*ibid.*, pp. XIV; XV):

> "The reasons for the failures of the Chinese Nationalist Government appear in some detail in the attached record. They do not stem from any inadequacy of American aid. Our military observers on the spot have reported that the Nationalist armies did not lose a single battle during the crucial year of 1948 through lack of arms or ammunition. The fact was that the decay which our observers had detected in Chungking early in the war had fatally sapped the powers of resistance of the Kuomintang. Its leaders had proved incapable of meeting the crisis confronting them, its troops had lost the will to fight, and its Government had lost popular support. The Communists, on the

other hand, through a ruthless discipline and fanatical zeal, attempted to sell themselves as guardians and liberators of the people. The Nationalist armies did not have to be defeated; they disintegrated. History has proved again and again that a regime without faith in itself and an army without morale cannot survive the test of battle."

Russia: In the *Dennis* case, Mr. Justice JACKSON said, 341 U. S. at 565: "The Communist recognizes that an established government in control of modern technology cannot be overthrown by force until it is about ready to fall of its own weight. Concerted uprising, therefore, is to await that contingency and revolution is seen, not as a sudden episode, but as the consummation of a long process." In support of this thesis, he wrote of the two Russian revolutions of 1917 in these terms, 341 U. S. at 565, note 7:

"The Czar's government, in February 1917, literally gave up, almost without violence, to the Provisional Government, because it was ready to fall apart from its corruption, ineptitude, superstition, oppression and defeat. The revolutionary parties had little to do with this and regarded it as a bourgeoisie triumph. Lenin was an exile in Switzerland, Trotsky in the United States, and Stalin was in Siberia. The Provisional Government attempted to continue the war against Germany, but it, too, was unable to solve internal problems and its Galician campaign failed with heavy losses. By October, its prestige and influence sank so low that it could not continue. Meanwhile, Lenin and Trotsky had returned and consolidated the Bolshevik position around the Soviets, or trade unions. They simply took over power in an almost bloodless revotion between October 25 and November 7, 1917. * * *"

Germany: In Boudin, *"Seditious Doctrines" and the "Clear and Present Danger" Rule,* 1952, 38 Va. Law Rev. 143, 343-344, it is said:

> "That the Communists were not ready to overturn a legitimately established government by force and violence even in times of crisis, and certainly could not do so, is further shown by the fact that although the German Communist Party was the strongest Communist group outside of Russia in 1932* it yet did not attempt to prevent Hitler's assumption of power by using its supposedly well disciplined organization, and this notwithstanding the existence of the 'mighty' Soviet Union. Further, it must be borne in mind that Hitler assumed power in a time of economic crisis, a crisis which embraced the entire capitalist world, when there were six million unemployed in Germany. Nor did they attempt to institute revolution in any country of Western Continental Europe where their parties had more adherents and their influence in the labor movement was far greater than they could hope to have or possess in the United States at any time in the near future."

United States: That there has never been any danger of attempt at violent overthrow of the Government of the United States by the Communists—either in severe economic depression, time of war, or any other time—is attested by our own history. Thus does Boudin say in the article above cited (38 Va. L. Rev. 143, 344):

> "That the puny American party with its meager influence in the United States never dreamed of instituting a revolution when we were in the same economic crisis

* Footnote 134 at this point in Boudin's article reads as follows: "The Party polled some five million votes in the presidential election of 1932 out of a total of thirty-five millions, or about fifteen percent of the total vote."

(i.e., in the 1930's) is, of course, a matter of history. This, notwithstanding the fact that at that time (1) they enjoyed a certain amount of respectability, at least among the intellectuals; (2) the number of unemployed in this country was between twelve and fifteen millions; and (3) the farmers of Iowa and other communities were in revolt, though not in revolution. In short, in the words of Justice Brandeis, this country was 'confronted with an emergency more serious than war'."

And what has the Party taught and advocated in time of what it has regarded as an imperialist war? The record is clear. The fact is that although the Communist Party of the United States thought that our huge post-war armaments and expenditures would lead to "a catastrophic economic and financial crash" (DE 8 x E-9, *Political Affairs*, Oct. 1950, 68), and although we had, at the date of the indictment herein, been engaged for almost a year in the war in Korea—a war which the Party regarded and described as "an unjust, imperialist war" (DE 8 x E-7, *Political Affairs*, Oct. 1950, 45)—not a single word was said, nor a single act done, by or on behalf of the Communist Party, which even the grossest distortion could convert into advocacy or threat of violent overthrow of the Government of the United States. On the contrary, the uncontroverted evidence is that throughout the Korean War, the Communist Party of the United States advocated only the pursuit of peaceful and constitutional means to bring the hostilities to an end and to lay a basis for universal peace. Thus, in October, 1950, *Political Affairs* published an article by petitioner Weinstone which declared that "it is imperative to point out that peace with the Soviet Union is not only desirable and necessary, but entirely possible" and that "it is necessary * * * to urge the workers and the people generally along the path of inde-

pendent political action" (DE 8 x E-7, 45). In the same issue of *Political Affairs* appeared an article by petitioner Bittelman which, at p. 74, declared (DE 8 x E-10):

> "The Communist Party will especially stress the need for *unity*, unity of action for the immediate and burning economic and political demands of the masses regardless of ideology or political affiliation. We will fight with the utmost concentration for the workers' united front and the people's front against war and fascism, for the broadest coalition in the fight for peace, for working-class unity in the struggle to defend the people's living standards, civil liberties and equal rights." (Italics in original.)

The evidence shows that particularly since the end of World War II, the Communist Party of the United States, in common with Communist Parties the world over, has envisaged and advocated the peaceful accession of the working class and its allies to governmental power on the basis of the election of a people's front government. For the teaching and advocacy of the Communist Parties of Great Britain, Australia and Canada, the Court is respectfully referred to pages 117-122 of the Appendix to this Petition. How the Communist Party of the United States envisages and teaches that a people's front government could come into being on the basis of a people's coalition and evolve, in an altogether lawful way, into one that could ultimately introduce socialism in the United States was articulated by William Z. Foster, Chairman of the Party, two years before the return of the indictment herein, in his book, *The Twilight of World Capitalism*, portions of which were received in evidence on the trial herein as DE SS-1-2 (Appendix to this Petition, 124-127); and by petitioner Elizabeth Gurley Flynn in her testimony at the trial herein (Appendix to this Petition, 128-130).

In conclusion, it is pertinent to observe that the trial judge's finding of clear and present danger was predicated on the apprehension that: "Any border fray, any diplomatic incident, any difference in construction of the modus vivendi * * * might prove a spark in the tinder-box, and lead to war of survival in extension of or in addition to the war in which we were engaged in Korea" (*supra*, p. 35). In what has preceded we have demonstrated that even if these apprehensions of a possible future war were well-founded, there was no probability that these petitioners and their alleged co-conspirators would attempt the overthrow of the Government. Now not even the apprehension of war remains to support these convictions. For even as we write these lines we hear the President of the United States proclaim to a war-weary world his confidence in the possibility of permanent peace, in these words (Address to National Council of Catholic Women, *New York Times*, November 9, 1954, p. 14):

> "The fathers and mothers of our land rejoice that the possibility of permanent peace is more promising than in any time in recent years."

III

The evidence was insufficient in law to establish each petitioner's guilt beyond a reasonable doubt.

The petitioners moved for acquittal at the close of the Government's case (Tr. 9751), as well as at the close of the entire case (Tr. 13760), on the ground that the evidence was insufficient to establish their guilt. While petitioners' brief in the Court of Appeals did not devote any one specific point exclusively to the question of the sufficiency of the evidence, the contention was made over and over again throughout the brief, particularly with reference to (a) the

nature and content of the teaching and advocacy of the Communist Party, (b) petitioners' intent to teach or advocate and bring about forcible and violent overthrow of the Government, (c) whether there was a clear and present danger of such overthrow (Appendix to this Petition, 81, 82, 84-85, 111, 140-144).

The indictment charged that from on or about April 1, 1945, until the filing of the indictment on June 20, 1951, petitioners were engaged in a conspiracy with the *Dennis* defendants and other unknown persons "(1) unlawfully, wilfully, and knowingly to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence; and (2) unlawfully, wilfully, and knowingly, to organize and help to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence" (A. App. 4-5).

The theory of the prosecution was that prior to 1944 the Communist Party taught and advocated the principles of Marxism-Leninism which, according to the prosecution, taught and advocated the forcible and violent overthrow of the Government of the United States; that in May, 1944, the Communist Party was dissolved and its place taken by the Communist Political Association, which latter organization adopted a program that was one of cooperation between labor and management and, in general, one designed to achieve national unity and peace and prosperity in the post-war period; and that in 1945, the Communist Political Association was dissolved and the Communist Party reconstituted, pursuant to a conspiracy to teach and advocate the forcible and violent overthrow of the Government by returning the Party to the basic principles of Marxism-Leninism. There was no evidence in this case of

an express agreement either among the petitioners or between the petitioners and anybody else to teach and advocate forcible and violent overthrow of the Government or to reconstitute the Communist Party for that purpose. In the context of this case, the absence of such evidence is persuasive that the conspiracy charged was altogether nonexistent. For among the Government's witnesses there were two—Budenz and Lautner—whose positions and activities within the Communist Party were of such character and importance, that, had there been such an agreement, they would certainly have known of it and, hence, testified to it. But they gave no such testimony.

The theory on which the Government predicates the guilt of the petitioners is: That during the conspiracy period the Communist Party taught and advocated the principles of Marxism-Leninism; that these principles teach and advocate the overthrow of the Government of the United States by force and violence; and that an agreement to teach and advocate such violent overthrow may be attributed to the petitioners on the strength of their membership and positions in the Communist Party and their activities in its behalf. Basically the Government's contention is that the principles of Marxism-Leninism and their teaching and advocacy of the forcible and violent overthrow of the Government of the United States are to be found in the writings of Marx, Engels, Lenin and Stalin. It placed its main reliance on the following writings: *The Communist Manifesto* by Marx and Engels (1848); *State and Revolution* by Lenin (1917); *Foundations of Leninism* by Stalin (1924); and *History of the Communist Party of the Soviet Union (B)* (1939).

With the exception of the last-named work, these were the same writings which were considered by this Court in *Schneiderman* v. *United States*, 320 U. S. 118, where the Government sought to cancel Schneiderman's certificate

of citizenship on the ground that he had not, at the time of his procurement thereof in 1927 and during the five years immediately preceding that date, behaved as a person attached to the principles of the Constitution of the United States. The Government contended that Schneiderman believed, during that period, in the forcible and violent overthrow of the Government of the United States. To support that contention, it showed that the aforementioned writings and the principles contained in them were taught and advocated by the Communist Party during the five years preceding 1927. It maintained that these writings taught and advocated violent overthrow of the Government of the United States. And it argued that since Schneiderman avowed his adherence to the teaching and advocacy of the Communist Party, and had during the five years preceding 1927 been a member of and held positions in the Party, belief in the forcible and violent overthrow of the Government was imputable to him. Its contention, as stated in the opinion of the Court, was (320 U. S. at 147):

> "• • • [T]hat it is proper to impute to petitioner certain excerpts from the documents in evidence upon which it particularly relies to show that advocacy of force and violence was a principle of the Communist Party of the United States in 1927, because those documents were official publications carefully supervised by the Party, because of the Party's notorious discipline over its members, and because petitioner was not a mere 'rank and file or accidental member of the Party' but 'an intelligent and educated individual' who 'became a leader of these organizations as an intellectual revolutionary'."

This Court rejected the contention. Noting that the Government itself had conceded "the presence [in Marxist-Leninist writings] of sharply conflicting views on the issue

of force and violence as a Party principle" (320 U. S. at 148), the Court said (320 U. S. at 157; 158):

> "A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open. * * *
>
> "In so holding we do not decide what interpretation of the Party's attitude toward force and violence is the most probable on the basis of the present record, or that petitioner's testimony is acceptable at face value. We hold only that where two interpretations of an organization's program are possible, the one reprehensible and a bar to naturalization and the other permissible, a court in a denaturalization proceeding, assuming that it can re-examine a finding of attachment upon a charge of illegal procurement, is not justified in canceling a certificate of citizenship by imputing the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was his interpretation."

If this is true in a denaturalization proceeding, it must *a fortiori* be true in a criminal case where personal guilt must be established beyond a reasonable doubt. On principle it would, therefore, be impermissible to impute to these petitioners solely on the basis of their membership and positions in the Communist Party, a belief that the principles of Marxism-Leninism teach and advocate the

violent overthrow of the Government. Moreover, to do so would violate section 4(f) of the Internal Security Act of 1950, 64 Stat. 992, 50 U.S.C. 783(f), which provides: "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section *or of any other criminal statute.*"

The Government, therefore, sought to charge the petitioners with a reprehensible interpretation of Marxism-Leninism through the device of an "expert" opinion as to the meaning of that term. Hence, on the direct examination of Budenz, it asked him to state the meaning of the following sentence in the preamble to the Constitution adopted at the 1945 convention at which the Party was reconstituted: "The Communist Party of the United States is the political party of the American working class, basing itself on the principles of scientific socialism, Marxism-Leninism." And his answer was (Tr. 2204-05):

> "Marxism-Leninism historically and conventionally in the Communist movement and as used and understood is the science of society or so-called science of society represented in the teachings of Marx, Engels, Lenin and Stalin, particularly as supplemented and defended by Lenin and Stalin, the foundation or backbone of which is the violent shattering of the governments of the bourgeois states and the setting up of a dictatorship of the proletariat by force as stated by Lenin in State and Revolution, and Stalin in the Foundations of Leninism. This applies to the Government of the United States under the constitution as that ready-made state machinery developed to a point of imperialist perfection which must be smashed as Lenin and Stalin have both stated."

This was not a definition that Budenz had obtained from any of the petitioners or from any of their alleged co-

conspirators. For he did not attribute it to any of them. It apparently rested on nothing more than his own interpretation of the writings of Marx, Engels, Lenin and Stalin. As such, it was impotent to remove what this Court, in *Schneiderman, supra,* called "the presence [in Marxist-Leninist writings] of sharply conflicting views on the issue of force and violence as a Party principle" (320 U. S. at 148).

In further attempted support of its imputation to these petitioners of a "reprehensible interpretation" of Marxism-Leninism, the Government placed major emphasis on the circumstances leading to and surrounding the dissolution of the Party in 1944 and its reconstitution in 1945. Its theory was that the Party was dissolved during the war, in 1944, and the Communist Political Association formed in its place, because American Communists thought it "necessary that Communists should indicate that they were not at that time raising the question of socialism in the United States, that this drastic change should be made in the name of national unity so that it would appear that communism was diminishing in the United States" (Tr. 15262-63); and that when the Party was reconstituted at the national convention of the Communist Political Association in July, 1945, "this fine idea of national unity and class peace (was) abandoned", for the purpose of teaching and advocating the overthrow of the Government by force and violence (Tr. 15264). The Government contended that the Party was reconstituted for this purpose "as a direct result" of an article by Jacques Duclos, Secretary of the French Communist Party, which severely criticized the previous dissolution of the Party (Tr. 15264). But there is absolutely nothing in that article (GE 13) which by the widest stretch of the imagination can be construed as suggesting that national unity be abandoned and replaced by the teaching and advocacy of violent overthrow of the

Government. For, far from criticizing American Communists for their desire for national unity, the article commended them, saying (GE 13):

> "Everyone understands that the Communists of the United States want to work to achieve unity in their country."

What the article condemned was the *dissolution* of the Party. And it did so because it regarded the dissolution as evidence that American Communists were seeking national unity by means which would not achieve it, i.e., by reliance on "the good will of the men of the trusts." Thus did the sentence immediately following the one quoted above say (GE 13):

> "But it is less understandable that they (American Communists) envisage the solution of the problem of national unity with the good will of the men of the trusts, and under quasi-idyllic conditions, as if the capitalist regime had been able to change its nature by some unknown miracle."

Duclos' view was that the war aim of the United States, Great Britain and the Soviet Union was to "liquidate fascism in Germany and to help the liberated peoples to liquidate the remnants of fascism in the different countries"; and that since "the material bases for fascism reside in the trusts", reliance on "the men of the trusts" for the achievement of the national unity necessary to victory over fascism was misplaced. Hence he wrote (GE 13):

> "After the Teheran decisions came the Yalta decisions which expressed the will of the Big Three to liquidate fascism in Germany and to help the liberated peoples to liquidate the remnants of fascism in the different countries.

"It is scarcely necessary to recall that the material bases for fascism reside in the trusts, and the great objective of this war, the annihilation of fascism, can only be obtained to the extent in which the forces of democracy and progress do not shut their eyes to the economic and political circumstances which engender fascism."

Indeed, it was precisely because Duclos regarded a virile Communist Party as a necessary instrument for the achievement of national unity, that he condemned the dissolution of the Communist Party of the United States. Thus did he say (GE 13):

"It is beyond doubt that if, instead of dissolving the Communist Party of the United States all had been done to intensify its activity in the sense of developing an ardent national and anti-fascist policy, it could very greatly have consolidated its position and considerably extended its political influence. On the contrary, formation of the Communist Political Association could not but trouble the minds and obscure the perspectives in the eyes of the working masses.

"In France, under cover of Resistance unity, certain suggestions for the liquidation of the party have been circulated, with more or less discretion, during the last months, but none among us has ever thought of taking such suggestions seriously. It is not by liquidating the Party that we would have served national unity. On the contrary we are serving it by strengthening our Party. And as far as the American Communists are concerned, it is clear that their desire to serve the unity of their country and the cause of human progress places before them tasks which pre-suppose the existence of a powerful Communist Party."

That this was how the Communists of the United States viewed the matter when they reconstituted the Party in 1945 is shown by the following quotation from the resolution which the reconstituting convention adopted (DE M, 95-96):

> "That is why today we Communists must not only learn from our achievements in the struggle against fascism and reaction, but also from our weaknesses and errors. In the recent period, especially since January, 1944, these mistakes consisted in drawing a number of erroneous conclusions from the historic significance of the Teheran accord. Among these false conclusions was the concept that after the military defeat of Germany, the decisive sections of big capital would participate in the struggle to complete the destruction of fascism and would cooperate with the working people in the maintenance of postwar national unity. The reactionary class nature of finance capital makes these conclusions illusory. This has been amply demonstrated by recent events revealing the postwar aims of the trusts and cartels which seek imperialist aggrandizement and huge profits at the expense of the people."

This did not, however, mean that cooperation with all capitalist groupings was excluded. For the same resolution declared (DE M, 89):

> "While cooperating with the patriotic and democratic forces from all walks of life, labor must, in the first place, strengthen its ties with the veterans, the working farmers, the Negro people, youth, women, intellectuals and small business men, and with their democratic organizations. *At the same time, while forging the progressive unity of the nation, labor should cooperate with those capitalist groupings and elements who, for one or another reason, objectively at times, promote democratic aims.*" (Emphasis added.)

That the purpose of the reconstitution of the Communist Party in 1945 was to permit it to function and work within the framework of our democracy, and not to teach and advocate the forcible and violent overthrow of the Government, is attested by the program which the reconstituting convention adopted based on the following slogans of action (DE M, pp. 90-93):

"1. Speed the defeat of fascist-militarist Japan" (p. 90);

"2. Complete the destruction of fascism and build a durable peace" (p. 90);

"3. Push the fight for sixty million jobs—meet the human needs of reconversion" (p. 91);

"4. Keep faith with the men who fight for victory" (p. 92);

"5. Safeguard and extend democracy" (p. 92);

"6. Safeguard the future of America's youth" (p. 93).

The purpose of the reconstitution of the Party was to forge a united front or coalition of anti-fascist and democratic forces, with a view to achieving governmental power for such a coalition through the electoral process. Thus did the resolution adopted by the 1945 convention declare (GE 22, p. 820):

"[I]t is of central importance to build systematically the political strength and influence of labor, the Negro people, and all true democratic forces within the general coalition for the struggle against imperialist reaction, for combatting and checking all tendencies and groupings in the coalition willing to make concessions to reaction. The camp of reaction must not be appeased. It must be isolated and routed. Toward this

end it is necessary, as never before, to strengthen decisively the democratic unity of the nation, to create that kind of national unity for the postwar period which will be able to facilitate the destruction of fascism abroad and to prevent fascism from coming to power in the United States. *Therefore, it is essential to weld together and consolidate the broadest coalition of all anti-fascist and democratic forces as well as all other supporters of Roosevelt's anti-Axis policies.*" (Italics in original.)*

Indeed, it was admitted by the Government's witness Lautner that the aforementioned resolution was intended to "set out a program which (the Communist Party) thought would provide a broad people's coalition to protect and extend democracy in the United States and defeat the threat of fascism" (Lautner, Tr. 5341). Lautner also admitted that from 1945, when the Communist Party was reconstituted, to 1950, when he was expelled from the Party, it "had a united front policy" (Tr. 5424). What is of even greater significance is that he admitted that prior to its dissolution in 1944, he had been taught in the Communist Party that a united front "might lead to the election of a united front government" in which "the Communist Party

* The resolution explicitly excluded the issue of socialism from the perspective adopted by the convention, for it stated (DE M, 94):

"While not yet accepting Socialism as an ultimate goal, the American people today agree that fascism must be destroyed, wherever it exists or wherever it raises its head. The American people are ready to protect and extend the Bill of Rights and all democratic liberties. They are determined to fight for greater peace and democracy, for the right to work, greater job and social security.

"Therefore, Communists and non-Communists, all progressives and anti-fascists can be rallied in support of the above program of immediate action. For this program meets the immediate desires of the American people upon which the majority can unite today to prevent the rise of fascism and to assure victory in the 1945 municipal elections and in the fateful 1946 congressional elections which must be organized and prepared for now. This is a program which must be championed in every factory and industry, in every community and state, through the medium of labor's political action; through labor's joint and parallel action locally, and through broad shop steward conferences and united community movements, as well as through other broad united peoples and democratic front activities."

would participate", and which "might be a transition government leading to control of the State by the working class under the leadership of the Communist Party" (Tr. 5412). Indeed, Lautner further admitted that "the Communist Party in the United States took the position that this united front government so elected can and will by lawful methods, carry through the transition to socialism in the United States" (Tr. 5423).*

The foregoing is of the profoundest significance in its bearing on the question of whether the evidence was sufficient to establish that any of these petitioners, by their participation in the reconstitution of the Communist Party, understood and intended that the Party's return to the principles of Marxism-Leninism meant the teaching or advocacy of violent overthrow of the Government. For, as we shall show in a moment, the theory that a united front policy "might lead to the election of a united front government" in which "the Communist Party would participate" and which "might be a transition government leading to control of the State by the working class under the leadership of the Communist Party", had, long before the dissolution and subsequent reconstitution of the Communist Party, become an integral part of the body of Marxist-Leninist principles.

If this was so, it would seem clear that, in the absence of competent evidence to show that each of these petitioners actually and specifically intended the Party to be recon-

* On redirect examination Lautner was asked to state "the position of the Communist Party from 1945 to 1950 with respect to the question of electing a united front government which would defend and preserve American democracy and advance toward the socialist reorganization of society" (Tr. 6323-24) and he said: "The Party's position was that the united front government would be a transition government that could not solve the contradictions of capitalism and that would lead to the proletarian revolution and the dictatorship of the proletariat" (Tr. 6328). This does not, however, negate anything hereinabove quoted from his cross-examination, for it is to be observed that he did not say that the united front government was to be overthrown by force and violence.

stituted for the purpose of engaging in the proscribed teaching and advocacy, there was no basis for their conviction*

In 1935 the Communist Internationale held its Seventh World Congress (Dimitroff, *United Front Against Fascism*, GE 29 id.; GE 30 id.; DE F id.). Before that time fascism had come to power in Germany, as well as in Austria and Italy, and was making strong bids for power in many other countries, including France. The Communist movement regarded fascism in power as "the open terrorist dictatorship of the most reactionary, most chauvinistic and most imperialist elements of finance capital" (GE 29 id., p. 6-7). Dimitroff, in his report to the Seventh World Congress, which that body adopted, described fascism in these terms: "Fascism is a most ferocious attack by capital on the toiling masses; Fascism is unbridled chauvinism and annexationist war; Fascism is rabid reaction and counter-revolution; Fascism is the most vicious enemy of the working class and of all the toilers" (GE 29 id., 11).

To combat the threat of fascism in countries in which it had not come to power, Dimitroff, therefore, proposed, and the Seventh World Congress adopted his proposal, that: "In the mobilization of the toiling masses for the struggle against fascism, the formulation of a *broad people's anti-fascist front on the basis of the proletarian united front* is a particularly important task. The success of the entire struggle of the proletariat is closely connected with the establishment of a fighting alliance between the proletariat on the one hand and the toiling peasantry and the basic mass of the urban petty bourgeoisie constituting a majority in the population of even industrially developed countries, on the other" (GE 29 id., pp. 36-37; italics in original).

* If it was true, as this Court held in *Schneiderman* v. *United States*, *supra*, that there were in Marxist-Leninist writings "sharply conflicting views on the issue of force and violence as a Party principle" as of 1927, *before the adoption of the united front policy in 1935*, what shall we say of the situation *since* then?

It was further envisaged that on the basis of such an anti-fascist people's coalition, embracing a majority of the population in each country, it would be possible to elect united or people's front governments which, as Dimitroff phrased it, would be "governments of struggle against fascism and reaction" (GE 29 id., p. 69).

That the teaching embodied in Dimitroff's above-mentioned report and writings was regarded by Communists as an integral part of Marxist-Leninist teaching and advocacy after 1935, and that they so regarded them at the time of the reconstitution of the Communist Party in 1945 and throughout the period covered by the indictment, is attested by the fact that when Eugene Dennis, in a report to the National Committee of the Communist Political Association in June, 1945, shortly prior to the reconstitution, urged the need for "the widest and most profound study of the Marxist-Leninist classics", he included "the reports and writings of Comrade Dimitrov" among them; indeed, he named them *first* in the list of classics which he recommended for such study. For he said (GE 15-D):

> "It is also especially urgent now that we shall organize the most systematic study and mastery of Marxism-Leninism throughout our Association, from top to bottom. Starting with the planned study and application of the main line of the draft resolution of our National Board, with the Duclos article, as well as with Comrade Foster's letter of Jan. 20, 1944, *we must encourage and develop the widest and most profound study of the Marxist-Leninist classics, especially the reports and writings of Comrade Dimitrov;* the History of the CPSU; Lenin's Imperialism and Left-Wing Communism, Marx, Engels—Marxism, The Renegade Kautsky, and the Collapse of II International; and not least of all The Foundations of Leninism and the Mastery of Bolshevism by Stalin." (Emphasis added.)

With the possible exception of but one petitioner, there is no evidence that any of them said or did anything during the period covered by the indictment and for many years prior thereto which could reasonably be interpreted as evidence of an understanding or belief that the principles of Marxism-Leninism taught or advocated the duty or necessity of overthrowing or destroying the Government of the United States by force and violence. As to most of them, there is no evidence that they *ever* said or did anything evidencing such an understanding or belief. As for the remaining petitioners, the acts or declarations attributed to them were so remote in point of time, almost all of them antedating the indictment by approximately fifteen years, that they were devoid of a vitality sufficient in law to support a conclusion that they understood or intended the reconstituted Party—which dedicated itself to the achievement, through the electoral process, of a people's front government, based on an anti-fascist coalition—to teach and advocate the forcible and violent overthrow of the Government.

To support its theory, the prosecution introduced evidence of practices on the part of the Communist Party which it claimed evidenced a purpose to engage in the proscribed teaching and advocacy. These included such things as the Party's policy of concentrating on recruiting members from among workers engaged in the larger industries; conducting its meetings in private and excluding non-members therefrom; conducting its schools in private and excluding non-members therefrom; making preparations for so-called underground existence in the event that its open existence and functioning should be made impossible; etc. None of these things was, however, sufficient, whether considered in isolation or collectively, to support the conclusion that these petitioners intended to teach and advocate the proscribed doctrine. For, as the trial judge

himself observed when the Government pressed the contention that going underground was evidence of an illegal purpose: "Well, does the fact that the Party decided to go underground mean anything more than they think they are unpopular" (Tr. 9971). And in respect to the so-called secrecy of the Party's activities, he observed: "It seems to me something more than the fact that people want to keep their activities secret is necessary to show that their activities are illegal, and certainly something more is necessary [than] that somebody engaged in secret activity to show that he knew what Budenz thought Marxism-Leninism was" (Tr. 9980).

It would seem clear, particularly in light of the constitutional questions raised in earlier portions of this Petition, that an important question concerning the constitutional sufficiency of the evidence herein is presented which ought to be reviewed by this Court.

IV

It was reversible error to admit Lautner's testimony that he had been subjected to physical violence and expulsion from the Communist Party, without hearing, by persons other than the petitioners.

The trial court, over the objection of the petitioners (A. App. 73), permitted Lautner to testify, in great detail, to the cruel and gruesome circumstances under which, he said, he had been coerced by threats and physical violence, perpetrated by persons other than the petitioners, to sign a confession, in January, 1950, that he was an "enemy agent"—a confession on the basis of which he was expelled from the Communist Party, without opportunity to be heard (A. App. 73-81). This testimony was admitted notwithstanding that none of the petitioners was present at or partici-

pated in the incident, and none was shown to have had any knowledge thereof or to have authorized or ratified it.

This same testimony was offered in eight other Smith Act prosecutions in which Lautner appeared as a witness. But in each of these cases the trial judge rejected it. The cases we refer to were the following: *United States* v. *Frankfeld*, 4 Cir., 198 F. 2d 679, cert. den., 344 U. S. 922; *United States* v. *Yates, et al.*, U. S. D. C., So. Dist. Cal., now pending in 9th Cir. Ct./App., No. 13,480; *United States* v. *Wellman, et al.*, U. S. D. C., East. Dist. Mich., now pending in 6th Cir. Ct./App., No. 12,237; *United States* v *Huff, et al.*, U. S. D. C., West. Dist. Wash., now pending in 9th Cir. Ct./App.; *United States* v. *Fujimoto, et al.*, U. S. D. C., Dist. of Hawaii, now pending in 9th Cir. Ct./App.; *United States* v. *Mesarosh, et al.*, U. S. D. C., West. Dist. Pa., appeal now pending in 3rd Cir. Ct./App.; *United States* v. *Forest, et al.*, U. S. D. C., East. Dist. Missouri, appeal now pending in 8th Cir. Ct./App.; and *United States* v. *Kuzma, et al.*, U. S. D. C., East. Dist. Pa., appeal now pending in 3rd Cir. Ct./App.

After the petitioners were convicted, the trial judge entertained such misgiving as to the admissibility of the testimony, that he granted them bail pending appeal on the ground that its admission presented a substantial question (A. App. 116).

There was no valid ground for the admission of this testimony against these petitioners. Not only was it utterly devoid of any rational tendency to prove any fact relevant to their guilt, but it was so inflammatory and prejudicial as to exclude the possibility of the jury's calm and dispassionate consideration of the evidence as a whole.

Although, as we have said, none of the petitioners was in any way connected therewith, Lautner was permitted to testify as follows: Early in January, 1950, at the request of Jack Kling, who was then National Treasurer of the Communist Party, he went to Cleveland, arriving there of

a Saturday morning (A. App. 73). Later that day he met Kling, and they drove to a house located in "the industrial part of Cleveland known as Kingsbury Run" (A. App. 73-74). As they entered the house, Kling suggested that they "go down in the cellar" (A. App. 73). Lautner described the cellar scene as follows (A. App. 74-75):

> "The cellar door was right at the end of the living room where a staircase was leading upstairs, and under the staircase was steps going down in the cellar. I walked ahead. I went down to the bottom of the staircase there. I saw two male persons, two men, playing cards at a table. Right beyond that table, about five feet away, there was a rope across the cellar and white sheets were drawn cutting off the other parts of that cellar. So when I came to the bottom of the cellar, there was only this table there and a few chairs. There was a woodpile under the staircase and there was a little box with kindling wood right alongside of the staircase there, and on the side of the wall where the staircase ends there was a washtub, a sink, and both spigots were running full blast. The water was running into that washtub. When I stepped down, these two men that were playing cards got up and one of them turned towards me and told me to undress."

About "four or five minutes" after Lautner entered the cellar (A. App. 76), Kling came down to the cellar accompanied by Joe Brand, who was Labor Secretary of the Communist Party of Ohio, and Solly Whelman, who was a member of the State Secretariat of the Communist Party of Michigan (A. App. 76). Lautner was then "stark naked" (A. App. 77). Kling and his associates "came down with two boxes and they set up a tape recording machine, and what they said was a lie detector, * * *. I was told to sit down at the table on one of the chairs, and I asked Jack Kling, 'Well, what's this?'. And he said,

'You will find out'. And he said some vile words there" (A. App. 77). He testified further as follows (A. App. 77-78):

"I asked Jack to allow me to put on some clothes because it was cold in the cellar. They were in overcoats. I was shivering.

"Joe Brand said, 'You don't need any clothes. You are not going anywhere.'

"I sat there naked on a chair, cement floor. I was told that I won't get away; we got you; you thought you were going to get away with it.

"I was accused of being an enemy agent in the ranks of the Party. I protested and I said that this is not true. They said, 'Well, who do you think you are fooling!'

"In the meantime the tape recording machine was rigged up and also this alleged lie detector. I don't know what it was. This is what they said it was. They put a tape on my wrist and a ball in my hand, and I was supposed to keep my hand on the table, and every time I said something, this chauffeur who drove the car—who was on the other side, on the instrument side of this thing—and every time I said something he called me a God damn liar, that I was lying.

"I told Jack that a terrible mistake is being done over here, and I was just laughed at. They were all laughing at me.

"I asked Jack again to allow me to put on some clothes. He didn't even listen to me. One man was behind my neck with a gun right against my head, pressing my head closer to the microphone of this tape recorder because they were testing it in the meantime and it didn't come through satisfactorily; the recording was not satisfactory.

"The other fellow had a rubber hose.

"By the way, there was some butcher knives on that little box where they threw my clothes. There were

two butcher knives over there and about three more rubber hoses over there, and this fellow with the rubber hose was hitting the side of the wooden wall that covered the staircase coming down."

Kling asked him when he was in contact with the Central Intelligence Agency, and asked him whether he had given oral or written reports to that Agency, and how often he had made such reports (A. App. 78). He was asked when and where he was in conversation with Noel and Herman Field (A. App. 78). He "denied all the questions that they threw at me, that it is not true," but "this fellow always said that I was a God-damn liar, that the machine says different" (A. App. 78). He asked again to be permitted to put on his clothes, but he was not allowed to put on anything; he was in bare feet and completely naked (A. App. 78). Brand shook a book in his face and said, "We know who you are, we know all about you, why deny it" (A. App. 78). At or about this point, Kling, Brand and Whelman went upstairs, returning about ten minutes later (A. App. 79). Upon their return to the cellar, Lautner testified the following occurred (A. App. 79):

"Q. Will you continue to tell us what happened after they returned. A. Jack Kling told me to keep my head down and not to look anywhere, not to look up. I kept my head down. When I raised my head, this person with the gun behind me always poked my head down with the gun.

"Q. Had you gotten dressed in the meanwhile? A. No, I was still naked. Joe Brand got behind me, and he was the only person who hit me. Jack Kling said, 'You will have to write a statement to the effect that you are being accused and that you had a fair and impartial hearing.'

"Q. Did you write such a statement? A. I wrote that statement with a pencil and paper they gave me,

that I had a fair and impartial hearing and I was accused of being an enemy agent. Joe Brand says, 'Well, let us have it in ink' after I had finished that statement. I wrote the other statement in ink, the same statement. So I made two statements, one in a pencil writing and one in an ink writing."

After Lautner had written out the statement requested of him his clothes were returned to him and he got dressed (A. App. 80). Some of the money which he had had in his clothes and a pair of gloves were not returned to him (A. App. 80). He was then taken upstairs and put into a car (A. App. 80). He remembered going over a wooden bridge and then another bridge and "they threw me out of the car near a factory site near Scoville Avenue. They told me to walk down the street on the other side and there is a bus stop and take the bus there and that will take me back downtown" (A. App. 80-81). On the Tuesday next following, i.e., January 17, 1950, Lautner said he read an item in the *Daily Worker* to the effect that he had been expelled from the Communist Party (A. App. 81). He said that he attempted to appeal his expulsion; he sent a letter to petitioner Trachtenberg who was then Chairman of the Review Commission, but received no response thereto (A. App. 81).

The Court below said of the foregoing as follows:

"We have no doubt as to the relevancy of the testimony. Lautner's expulsion tended to prove two theses advanced by the prosecution in support of its contention that an objective of the Communist Party was the forcible overthrow of the Government: *first*, that the Party functioned not as an ordinary political party but in a covert, deceptive, violent, and highly disciplined manner, such as might be expected of a revolutionary organization; and *second*, that although the provisions of the Party Constitution seemed to belie a revolutionary purpose, the Constitution was not in practice faithfully observed—the Government's so-called 'Aesopian' theory."

In so holding, the Court erred. It is a commonplace that even in the ordinary conspiracy case, the acts and declarations of co-conspirators are admissible against an accused only if they are done and made in the course of the conspiracy and in furtherance of its objects (*Krulewitch* v. *United States, supra,* 336 U. S. 440, 443). In the case at bar it was charged that the object of the alleged conspiracy was to teach and advocate the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. Hence, Lautner's testimony would be admissible only if it showed that the acts and declarations to which he testified were designed to further that object. But it did not show that. What it showed was, that if he was dealt with as he said he was, it was only because he was believed to be a Government spy and informer in the ranks of the Party. Whether it was proper to deal with him in that way, is beside the point. For the elimination from the ranks of an organization of one who is thought to be a Government spy therein, no matter how it is accomplished, has no rational tendency to prove that the organization is engaged in unlawful activities. To say otherwise, is to give an organization a Hobson's choice of either harboring spies or running the risk, if it expels them, of incurring the inference that it was engaged in illegal activities. The presence of a spy, particularly in a minority political party, must inevitably strike dread and terror in the hearts of its members, no matter how lawful and proper their objects and activities may be. For, as was said in a *Report Upon the Illegal Practices of the United States Department of Justice,* covering the use of informers during the period 1917-1921, which was signed by twelve eminent members of the bar, including Felix Frankfurter, now Associate Justice of the United States Supreme Court, Zechariah Chafee, Jr., Professor of Law at Harvard University, Roscoe Pound, then Dean of the Harvard Law School (p. 5):

"We do not question the right of the Department of Justice to use its agents in the Bureau of Investigation to ascertain when the law is being violated. But the American people has never tolerated the use of under-cover provocative agents or 'agents provocateurs', such as have been familiar in old Russia or Spain! *Such agents have been introduced by the Department of Justice into the radical movements, have reached positions of influence therein, have occupied themselves with informing upon or instigating acts which might be declared criminal* • • •." (Emphasis added.)

That the sole motivation for Lautner's expulsion was the belief that he was a Government spy is made clear by Lautner himself. Witness the following from his testimony:

"I was accused of being an enemy agent in the ranks of the Party. I protested and I said this is not true. They said, 'Well, who do you think you are fooling?' " (A. App. 77)

"Joe Brand was shaking this book into my face and said, 'We know who you are, we know all about you, why deny it.' He said, 'You had better come clean and tell us all your contacts and all your connections with all these agencies'." (A. App. 78)

"Jack Kling said, 'You will have to write a statement to the effect that you are being accused and that you had a fair and impartial hearing.' • • • I wrote that statement with a pencil and paper they gave me, that I had a fair and impartial hearing and that I was accused of being an enemy agent." (A. App. 79-80)

One of the theories on which the Court below sustained the admissibility of Lautner's testimony was that the Party Constitution required that he be afforded an op-

portunity to be heard before he was expelled; and that since he had not been given that opportunity this tended to show that all provisions in the Constitution were "Aesopian", including those which declared that, "The Communist Party upholds the achievements of American democracy and defends the United States Constitution and its Bill of Rights (GE 18, p. 3; GE 66, p. 3), and that, "Adherence to or participation in the activities of any clique, group, circle, faction or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy, whereby the majority of the American people can maintain their right to determine their destinies in any degree, shall be punished by immediate expulsion" (GE 18, Art. IX, sec. 2; cf. GE 66, Art. VIII, sec. 3). We respectfully submit that it is a wholly unwarranted leap, both in law and logic, to say that because an organization has expelled a member who is believed to be a spy, without giving him the hearing provided for in its constitution, it is reasonable to infer that it regarded *all* of its constitutional provisions as mere window dressing and intended to bring about the violent overthrow of the Government.

Moreover, it would seem manifest that even if there were some ground on which evidence of the bare fact of Lautner's expulsion without hearing would be admissible, the same cannot, in any event, be said for his testimony concerning the events in Cleveland. For that testimony, obviously, had no rational tendency to prove any fact in issue relevant to the guilt of the petitioners. Its only effect could be to inflame the jury and prevent a fair and impartial verdict. *United States* v. *Krulewitch*, 2 Cir., 145 F. 2d 76, is a case in point. Although that case involved a panderer, it is not inappropriate to cite it here, for, the instant case, involving as it does the constitutional freedoms guaranteed by the First Amendment, calls even more imperatively for the application of the evidentiary principles

there enunciated. Krulewitch was convicted for transporting a woman, named Joyce, in interstate commerce for purposes of prostitution. One of the two grounds on which the Court reversed his conviction was that one Mary Smith had been permitted to testify that a short time after Krulewitch had engaged her as a domestic servant he had raped her. In holding that the admission of that testimony constituted reversible error, Judge LEARNED HAND, writing for the Court, said (145 F. 2d at 80):

> "The other question is of the admission of a part of the testimony of one, Mary Smith—also a prostitute—who swore that the accused had lived off her earnings while she was so engaged. So far, her testimony was competent upon the issue of his purpose in taking Joyce to Florida, for it fell within the well-established doctrine that other instances of similar conduct are competent to prove intent (or purpose) upon the occasion for which the accused is on trial. Neff v. United States, 8 Cir., 105 F. 2d 688. Cohen v. United States, 5 Cir., 120 F. 2d 139. Had she said no more, no doubt would be raised. But she was asked to tell her relations with the accused from the outset, and she said that he had first employed her as a domestic servant in his apartment, and that a short time after she came to live there he had one night raped her. It was after this prelude, she said, that he had persuaded her to become a prostitute for his profit. Had the indictment been for transporting Joyce to enjoy her favors, this evidence would have been clearly competent under the rule we have mentioned. But it was not and rationally it does not in the least tend to prove that a man is living from the earnings of a harlot that he has raped another woman. Nor does it even add to the probability that the raped woman also became a harlot and that the man lived off her earnings."

So may it be said with equal validity here that "rationally it does not in the least tend to prove" that men intended the violent overthrow of the Government, that they perpetrated an assault on one whom they regarded as an enemy in their ranks.

But even if the testimony concerning the Cleveland incident had been rationally relevant to the conclusion which the Government sought to prove through it, it would still have been inadmissible under the principle stated as follows in the *Krulewitch* case (145 F. 2d at 80):

> "• • • [T]he competence of evidence in the end depends upon whether it is likely, all things considered, to advance the search for the truth; and that does not inevitably follow from the fact that is rationally relevant. As has been said over and over again, the question is always whether what it will contribute rationally to a solution is more than matched by its possibilities of confusion and surprise, by the length of time and the expense it will involve, and by the chance that it will divert the jury from the fact which should control their verdict. Wigmore §§ 39(2), 42."

For it is surely as valid to say of the Cleveland testimony what Judge HAND said of Mary Smith's testimony in the *Krulewitch* case at p. 80:

> "That part of Mary Smith's testimony which we are considering did not, as we have said, even tend to prove the accused's purpose in transporting Joyce; but if it had, it was much more likely to divert, than to enlighten, the jury. For, even though there can be squeezed from it some drop of confirmation of her story that she 'worked' for him, it was at a cost more than commensurate with the dangers it involved, it greatly tended to muddle the jury, and to lead them to convict the accused because he was in general so loathsome."

How devastating an impact this testimony must have made on the jury is, we think, all too apparent, particularly when account is taken of the climate of hostile public opinion in which these petitioners went to trial. The testimony concerning the Cleveland incident was the only item of evidence in the case which tended to show the commission of an illegal *act*—true, not an act committed by any of these petitioners, but one which the Court instructed the jury they could consider as an act of the petitioners, at least for the purpose of inferring their intent. As such, the incident stood out as one of towering importance—of such importance, that Government counsel knew he had but to *mention* it in his summation to the jury, to conjure it in all its intended horror before their eyes. For one can almost see the knowing glance and hear the accusatory inflection of the prosecutor as he referred to the incident in these words: *"You will recall, without my going into the evidence, the type of hearing received by the witness Lautner"* (Tr. 15281; emphasis added).

V

The methods of jury selection violated constitutional and statutory requirements.

The Composition of the Jury List

Petitioners' challenge to the array rests upon the grounds that (1) the jury lists, panels and array from which the petit jury was drawn were intentionally and systematically limited to mere token representation of Negroes, Puerto Ricans and manual workers; (2) the responsible jury officials failed to carry out the statutory and constitutional mandate to employ such methods and procedures as would ensure a representation of a cross-section of the community; and (3) the basic jury list was so weighted with and loaded by the numerically small but economically dominant

groups in the community as to preclude a fair and impartial trial in this case in view of the special interest which such groups have in silencing the defendants in a Smith Act prosecution.

The basic jury list from which was drawn the panel of prospective jurors available for this case contained 14,000 persons. Of this number, manual workers, who constitute over 50% of the employed males in the Southern District of New York qualified to serve, comprise but 7% of the employed males on the jury list (Doc. No. 189, pp. 4, 10, Vol. VI).* On the other hand, managers, officials and proprietors, who represent only 15% of the employed males in the Southern District, comprise 44% of the employed males on the jury list. Together with the closely related groups of professional and sales persons, they comprise *four-fifths* of all the employed males on the jury list, although the combined groups represent only one-third of all the employed males in the area (ibid., p. 10).

Negroes constitute 13% of the population of the Southern District. Over 500,000 live in the three main counties of the Southern District, Westchester, Bronx and New York; 400,000 live in New York County, slightly less than 100,000 in the Bronx, and 40,000 in Westchester. They comprise 20%, 7% and 6% of the population of those counties respectively (Vol. VI, Doc. No. 189, p. 22). Puerto Ricans live in Manhattan and the Bronx in large numbers and comprise a substantial part of the population.

Yet Negro and Puerto Rican representation on the jury list is merely token. There is almost a total absence of

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* The petitioners analyzed the composition of each and every panel drawn for the six months period preceding the challenge. These panels, thirteen in number, referred to as the "current panels," contain 3,275 names. The current panels were considered by both the trial judge and the court below as a fair sample of the entire jury list. Hereafter when reference is made to the composition of the basic list, unless otherwise indicated support for such reference is the analysis of the current panels.

Workers designated by the petitioners as manual workers comprise craftsmen, operators, service workers and laborers classified in accordance with the Census Bureau classifications (Vol. VI, Doc. No. 189, pp. 7, 8).

Spanish surnames and a virtual complete absence of jurors from areas known to be inhabited by a substantial Negro population (Vol. VI, Doc. No. 189, p. 22).

Of the veniremen on the jury list who reside in Manhattan, 74.7% come from five favored assembly districts in which only 40.7% of the voting population of Manhattan resides. These districts, the 1st, 5th, 8th, 9th and 15th Assembly Districts, are almost completely without Negro and Puerto Rican population, and contain a large proportion of wealthy and upper middle class inhabitants. By contrast only 5.8% of the Manhattan veniremen come from seven other assembly districts, the 2nd, 4th, 11th, 12th, 13th, 14th and 16th, in which 32% of the Manhattan voting population resides. The overwhelming majority of Negroes, Puerto Ricans and manual workers are concentrated in these districts. The 9th Assembly District, known as the "silk-stocking district" (A. App. 16), has 21% of the veniremen, although only 7% of the voters reside within its boundary. This district alone has 61 times as many jurors as the 14th Assembly District whose population is overwhelmingly Negro (A. App. 16), and 3½ times as many jurors as the combined total of the aforementioned seven districts. Each one of the five favored districts, alone, has from two to three times as many veniremen as all seven of the excluded districts combined (Vol. VI, Doc. No. 189, p. 25). A similar pattern of distribution appears in the Bronx (ibid., pp. 32-36).

Moreover, even within the Assembly Districts in which the Negro people were known to reside, the few veniremen selected were selected almost exclusively from among the white voters. For most of the veniremen in these districts come either from housing projects or developments in which Negro and Puerto Rican people do not reside, or from areas within such districts in which no Negroes or Puerto Ricans reside (Vol. VI, Doc. No. 189, p. 30).

The exclusion of the Negro people is dramatically illustrated by a comparison of the representation accorded seg-

regated housing developments in which only white persons reside, with that accorded developments containing either a mixed population or an exclusively Negro population. Thus in the 3rd Assembly District in Manhattan, which contains 144 veniremen, 44 come from London Terrace, a high rent private apartment development where Negroes do not reside, which occupies but one of the approximately 250 city blocks in the District. By contrast, two public housing projects within the same Assembly District, Amsterdam Houses and J. Elliott Houses, whose occupants consist of both Negro and white voters, are not represented by a single venireman although their number far exceeds the number of London Terrace occupants (Vol. VI. Doc. No. 189, pp. 26-27).

The same pattern appears in the Assembly Districts in the Bronx (ibid., pp. 35-36).

The Methods of Jury List Selection

The record shows that the basic jury list was composed of persons who were qualified for jury service in the period between 1938 and March, 1952. Three different methods of selection were employed during that time. The first, employed in the period between 1938 and 1943, consisted of the selection of prospective jurors from among names furnished to the jury clerk by the Federal Grand Jurors Association, a private organization. The record discloses the following concerning this period.

In 1938 the array in the Southern District of New York underwent a "reorganization" designed to obtain a basic list of "superior", "very high type" citizens of "better", "more selective" and "uniformly high quality" to serve regularly as the jurors in the court. Concomitantly, the plan required the removal of "inferior" jurors, i.e., "relief workers and housewives" who were then "overcrowding" the juries. Until July, 1942, these substitutions were effected and the jury list was replenished, almost exclu-

sively, with names which were supplied by the Federal Grand Jurors Association (Vol. VI, Exh. 2 to Doc. No. 181, incorporated by reference in Doc. No. 189). The Federal Grand Jurors Association obtained the names which it submitted to the jury officials from such sources as *Who's Who in New York*, the *Social Register*, *Poor's Directory of Directors*, the *Engineers Directory* and certain university alumni directories (Vol. VI, Doc. No. 189, pp. 5, 6, 7, 8). The jurors recommended by the Federal Grand Jurors Association were accepted by the office of the Jury Clerk without investigation of any kind. The names supplied by the Association were supplemented to a slight extent by the jury clerk with names which he himself selected from sources similar to those used by the Association (Vol. VI, Doc. No. 189, p. 6). More than one-fourth of the persons selected in this manner remained on the basic list at the time the jurors were drawn for this case (Vol. VI, Doc. No. 189, p. 7).

The second method of selection, employed between 1943 and January 1949, consisted of the selection of additional jurors from voting lists. But the jury officials, in using such lists, concentrated on those districts containing predominantly white middle and upper class residents, while they made no use of the voting lists of those districts in which the population consisted overwhelmingly of Negroes, Puerto Ricans, and manual workers (Vol. VI, Doc. No. 189, pp. 8-10).

The record shows that two-thirds of the persons appearing on the basic list at the time the jurors were drawn for this case, consisted of persons selected by the two methods above described (Vol. VI, Doc. No. 191, p. 2). Since the two methods of jury selection in this period, i.e., from 1938 to the end of 1948, were the subject of a challenge in *United States* v. *Dennis*, 183 F. 2d 201, said period will hereinafter be referred to as the "*Dennis* period."

The third method was employed in the period between November 1949 and March 1952, the date of the challenge. In this period the jury officials sent a substantially equal number of qualification notices to each District in Manhattan and the Bronx.* Although they made a random selection of those to whom qualification notices were sent, they subsequently applied standards unauthorized by statute in determining eligibility for jury service. This resulted in eliminating the very same groups and classes which had previously been excluded from jury service during the *Dennis* period (Vol. VI, Doc. No. 199, tables VIII and IX).

The procedure which the jury clerks followed in this latter period, i.e., 1949 to March, 1952, was as follows: When a prospective juror appeared in response to the qualification notice, he was asked by a jury official whether he "knew of any reason why he should not serve on any jury" (A. App. 13-14). If he pleaded financial or physical hardship, he was excused by the clerk (A. App. 14). If he offered no such excuse, he was given a questionnaire which called for the following information: occupation, residence, education, property qualification and criminal record, if any (Challenge DE A). When the questionnaire was filled out, it was handed to the clerk or his assistant, who either accepted or rejected him as a juror. In some cases the reason for the rejection was noted on the questionnaire; in others it was not noted (A. App. 14-15). The reasons when noted included not only failure to meet statutory requirements such as age, residence, citizenship, literacy requirements, etc. (Tr. 438). They also included reasons *unauthorized by statute*, such as "appearance and manner", and failure to complete the questionnaire.

The record discloses that the overwhelming number of Negroes, Puerto Ricans and manual workers who responded

* This practice was not applied to Westchester County which received a substantially proportionate higher number of notices in relation to its voting population than did Manhattan and the Bronx.

to notices were eliminated by the jury clerk because of alleged financial hardship, appearance and manner, failure to complete the questionnaire, and for other reasons which were not specified at all.*

Importance of Questions Raised by the Challenge

The trial judge found that throughout the entire ten-year *Dennis* period there was no attempt to achieve a jury list representing a cross-section of those eligible for jury service (A. App. 28). Our recital of the facts shows that during that period, the design of the jury officials was to achieve a jury list which would reflect, not the Community, but the upper classes. By placing its imprimatur on a list which is tainted by these methods of selection to the extent of two-thirds of its present members, the Court below has sanctioned methods of jury selection which, if emulated elsewhere—as well they may be in view of the prestige of the Second Circuit—must strike a mortal blow at "our notions of what a proper jury is [which] have developed in harmony with basic concepts of a democratic society and a representative government" (*Glasser* v. *United States*, 315 U. S. 60, 85). For "it is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community" (*Smith* v. *Texas*, 311 U. S. 128, 130).

* An analysis of the period between April 1, 1951, and March 31, 1952, discloses that more than half of the manual workers who responded to notices were excused by the jury clerk and his assistants for financial hardship (Challenge GE 1, Table 5; Vol. VI, Doc. No. 199, p. 18; ibid., table VIII). Of the remaining 900 manual workers who received questionnaires in the one-year period under analysis, 234 were rejected for reasons noted on the questionnaire which were related to statutory standards of eligiblity. Of the 666 manual workers who remained, 85% were rejected for "appearance and manner" failure to complete questionnaires and by standards for which no reasons were given. Whereas, in contrast, of the 1,899 non-manual workers who survived elimination for statutory grounds only 35% were rejected by standards of appearance and manner, incomplete questionnaire or where none was specified (Vol. VI, Doc. No. 199, Table 1). A similar discriminatory result of the application of these standards is revealed with respect to Negroes and Puerto Ricans (Vol. VI, Doc. No. 199, Table III).

How the Court Below Dealt with the Challenge

The Dennis Period

With respect to the *Dennis* period the record contains direct proof of the discriminatory design and its effectuation.

The methods of jury selection in this period violated the constitutional and statutory command that jurors be drawn from a cross-section of the community (*Ballard* v. *United States,* 329 U. S. 187; *Thiel* v. *Southern Pacific Railway Company,* 328 U. S. 217; *Glasser* v. *United States,* 315 U. S. 60).

Petitioners relied on *Glasser* v. *United States, supra,* in support of their contention that the jury clerks' almost exclusive reliance on the Federal Grand Jurors Association for the names of prospective jurors during 1938-1943 was illegal. The Court below held that *Glasser* "condemns only exclusive reliance upon sources recommended by a private association and that the decisive question is whether partial reliance so weights the array under attack as to require its dismissal" (A. App. 242). Finding that approximately 28% of the jury list at the time of the trial herein consisted of jurors selected during 1938-1943, the Court held this to be insufficient to taint the list.

We submit that when more than one out of every four jurors has been selected on the basis of the recommendation of a private organization, the list is so weighted as to require dismissal of the list. However, this was not the only respect in which the list was improperly weighted. For, as we have shown, an additional forty percent of the list was selected during the years 1943 to the end of 1948, by limiting the selection of jurors to those who resided in the favored districts. By this means the clerk accomplished the same results as those produced by the use of the Federal Grand Jurors Association's recommendations. Thus the

basic jury list is tainted not to the extent of one out of every four jurors on the list, but two out of every three jurors.

The Court below justified this latter practice on the theory that it was permissible for jury officials in their search for competent jurors to "recognize in advance that there were groups which were 'poor risks,' so long as these groups be not entirely excluded or limited to token representation" (A. App. 243). We know of no principle or authority, except the decision of the Court below in *Dennis*, 183 F. 2d 201, which sanctions what is tantamount to group condemnation by jury officials. Such a concept is at war with the holding in *Thiel* v. *Southern Pacific Railway*, 328 U. S. 217, 220 that (1) Jury competence is an individual rather than a group or class matter and (2) advance group condemnations are intolerable under our law (*Thiel, supra*, at 224). Cf. *Cassell* v. *Texas*, 339 U. S. 282; *Hill* v. *Texas*, 316 U. S. 400; and *Norris* v. *Alabama*, 294 U. S. 587.

The Post-Dennis Period

It would seem clear that when two-thirds of a jury list is tainted as the one at bar was, a challenge thereto would have to be sustained. Not only did the Court below hold that the methods by which these two-thirds were procured were inherently lawful, it also held that these methods could be justified on the ground that no other proper method of jury selection would yield a different result. It found confirmation for this thesis in the fact that the post-*Dennis* method of selection, which they regarded as a random method properly administered by the jury officials, yielded substantially the same results as those which flowed from the methods used in the *Dennis* period.

In this the Court erred. For while qualification notices were distributed at random, the methods used in determin-

ing the eligibility of those who responded to the notices were arbitrary and unlawful.

Petitioners complain: 1) that the jury clerks unlawfully exercised a power not entrusted to them by law when they presumed to excuse prospective jurors for financial hardship; 2) that the jury clerks arbitrarily and unlawfully rejected persons who were fully qualified for jury service on improper grounds, such as "appearance and manner", failure to answer the questionnaire in its entirety and for unspecified reasons. Each of these complaints will be considered in the order stated.

(1) The jury clerks eliminated at least fifty percent of the manual workers who appeared in response to qualification notices in the post-*Dennis* period on a claim of financial hardship. Petitioners urge that this was an unlawful exercise of power by the jury clerks. The power to excuse a prospective juror for financial hardship is one that is expressly confided to District Judges (28 U. S. C., sec. 1863). It is a judicial, not an administrative function.

In disposing of this contention by petitioners, the Court below held that "the practice under which these excuses [financial hardship] are handled by the clerks appears to be contemplated by 28 U. S. C. A. sec. 1864, requiring the clerks to fill the jury box with names of 'qualified persons' " (A. App. 245). It reasoned:

> "This language certainly implies that jury clerks have discretion to omit persons as not 'qualified' because of deafness or illness for example. And we see no reason why such discretion should not extend to instances where the financial hardship of jury service might cause a prospective juror to worry, or feel annoyed or resentful, and thus interfere with his effective service as a juror." (A. App. 245)

This Court has held that the discretion of jury clerks "must be guided by pertinent *statutory* provisions" (*Thiel* v. *Southern Pacific Railway Co., supra,* at 220-221). While there is statutory authority for a clerk to excuse persons because of deafness or illness (28 U. S. C. A. sec. 1861(3); New York Judiciary Law, sec. 502(4)), there is none for his excusing of persons for financial hardship. Nor is there anything in 28 U. S. C. A. sec. 1864 which suggests he has any such power. That section deals solely with the manner of drawing jurors for trial from among those already qualified, the qualifications of the jury commissioner, and his compensation.

(2) The record shows that of those who appeared in response to qualification notices, a certain number were either excused for financial hardship or rejected on grounds provided for by statute. As to those who survived this process, the situation was as follows: 85% of the manual workers were eliminated by the application of such standards as "appearance and manner", failure to complete questionnaires, and for reasons not specified. On the other hand, only 32% of the non-manual workers were eliminated by the same standards and practices. To put it another way, *the application of these vague and unspecified standards resulted in the acceptance of only 15 out of every 100 manual workers for jury service, while 66 out of every 100 non-manual workers were accepted* (Vol. VI, Doc. No. 199, Table I). Substantially the same pattern appears in connection with the exclusion of Negroes and Puerto Ricans (ibid., Table IV).

The petitioners offered to prove, and the undisputed statistical data which they submitted in support of the offer confirmed, that manual workers, Negroes and Puerto Ricans possess the statutory qualifications for jury service in the same proportion and to the same extent as non-manual workers and white people (Vol. VI, Doc. No. 189,

pp. 4-5; Vol. VI).* Moreover, the assistant to the jury clerk testified that Negroes and manual workers who appeared for the purpose of qualifying were as intelligent, well-informed and literate as were the white non-manual workers and that the failure to meet these standards was not the basis for disqualifying most of the Negroes and manual workers (A. App. 17). It follows that the difference between the two groups in rate of rejection is to be explained only on the basis of intentional discrimination.

In any event, the vague and unspecified standards which the jury clerk used in determining eligibility for jury service necessarily contained opportunity for discrimination, which, in view of the gross under-representation of manual workers, Negroes, and Puerto Ricans, cast upon the Government the burden of negating such discrimination (*Avery* v. *Georgia*, 345 U. S. 559, 562)—a burden which it did not discharge.

In answer to the foregoing, the Court below said (A. App. 247):

> "* * * [We] cannot say that the so-called 'non-statutory' grounds for elimination were either improper *qua* standards or discriminatorily applied. The standards of qualification fixed by statute include several requirements, such as 'fair character,' 'approved integrity,' 'sound judgment,' 'well informed,' 'intelligent,' which may be ascertained in part by the prospective juror's appearance and manner, by his ability to spell and to complete the questionnaire according to instructions. And in those instances in which no reason for rejection had been noted, the Jury Clerk, upon examination by defendants as to three such cases, pointed out that two contained misspellings and one showed that the person would probably be over age by

* The trial judge treated as "established everything that defendants offered to prove except where the subject matter was covered by the testimony of the Court Clerks," there he "substituted the proof for the offer" (A. App. 52).

> the time he was called to serve. Thus in these instances, even where not noted, the reason for rejection was apparent on the face of the questionnaire."

The assumption by the Court that there was a relationship between the standards applied by the jury clerks and those fixed by statute is not supported by the record. The jury clerk testified that neither he nor his assistant applied any literacy or intelligence tests (Tr. 297), but that they relied on the "strength of the questionnaire" (Tr. 355). Moreover, the trial judge found that the criteria "appearance" and "manner" were not related to proper standards of eligibility (A. App. 49). The factor of "misspelling" was established as the "apparent" basis for the rejection of only three applicants out of a total of 582 persons who were rejected with no reason stated (Vol. VI, Doc. No. 199, Table 1A). Even assuming, *arguendo*, that there is a relationship between ability to spell and the statutory standards of eligibility, the record was silent as to the basis for the rejection of the remainder of the persons rejected in this manner.

Under the circumstances of this case, the burden was cast upon the Government to establish that the exclusions were caused by the operation of *bona fide* statutory standards of eligibility. *Avery* v. *Georgia*, 345 U. S. 559, 562; *Cassell* v. *Texas*, 339 U. S. 282, 288-289; *Hill* v. *Texas*, 316 U. S. 400, 404-405; *Pierre* v. *Louisiana*, 306 U. S. 354, 360; *Norris* v. *Alabama*, 294 U. S. 587, 598-599; *Neal* v. *Delaware*, 103 U. S. 370. This burden the Government did not meet.*

For all of the foregoing reasons petitioners respectfully submit that the question of whether the jury list of the Southern District of New York was the product of unlawful methods of selection should be decided by this Court.

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* The reliance by the trial court and the Court below on the blanket denial by the jury clerk of any conscious discrimination against the excluded groups was unwarranted (A. App. 247). This Court has consistently refused to accept such blanket denials in the face of evidence such as was presented in the instant case (*Cassell* v. *Texas, supra; Smith* v. *Texas*, 311 U. S. 128; *Pierre* v. *Louisiana, supra; Norris* v. *Alabama, supra*).

The jury officials violated their affirmative duty to employ such methods as would insure a representation of a cross section of the community.

The petitioners here raise a question not heretofore passed on by the Court, namely: whether those who are charged with the duty of selecting juries are required by the Constitution and the applicable statutes to make an active and affirmative effort to obtain juries which actually reflect a cross section of the eligible population, or whether they may justify a jury list, no matter how disproportionately the various eligible groups in the community are represented on it, solely on the ground that they have not been guilty of an intent to discriminate.

The requirement that a showing of an intention or design to exclude or limit the representation of any class in the jury system is necessary to sustain a challenge, is one that applies only to state juries which reach the federal courts under the Fourteenth Amendment. In such cases, the power of federal courts arises out of the federal question raised by a claim of violation of the due process and equal protection clauses of that Amendment. The act which violates the Fourtenth Amendment is purposeful and intentional discrimination against the group or class which is excluded from or granted only limited representation on the jury list (*Fay* v. *New York,* 332 U. S. 261 at 285). Therefore, in order to give rise to the constitutional grievance in cases involving state juries, the exclusion must be "rooted in design and not derived merely from error or fallible judgment" (*Snowden* v. *Hughes,* 321 U. S. 1; see also *Cassell* v. *Texas, supra,* at 290-291).

But the power of the federal courts over federal juries involves a far greater exercise of control than that which exists in its power over state juries (*Fay* v. *New York, supra,* 287; *Thiel* v. *Southern Pacific Co., supra,* at 225; *McNabb* v. *United States,* 318 U. S. 332, 340). It involves a "power of supervision over the administration of justice

in the federal courts" (*Ballard* v. *United States*, 329 U. S. 187, 192). Moreover, the principles which govern the process of selection of federal juries derives from congressional enactments which reflect a design to make the jury "a cross section of the community and truly representative of it" (*Ballard* v. *United States, supra*, at 191), and from principles of the Constitution embodied in the Sixth and not the Fourteenth Amendment (*Glasser* v. *United States, supra*, at 85).

The constitutional and statutory design is to achieve representation from a cross section of the community. Where there has been a failure to make any effort to achieve this result, the design is frustrated. In such a case it becomes unnecessary to establish a discriminatory intent in order to invalidate the list.

The rule in so far as it relates to the federal jury was stated in *Glasser, supra*, at 86, as follows:

> "But they [i.e., jury officials] must not allow the desire for competent jurors to lead them into selections which do not comport with *the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group* are undermining processes weakening the institution of jury trial, and should be sturdily resisted." (Emphasis added.)

As the Court pointed out in *Glasser, supra*, at 86, and in *Thiel, supra*, at 224, the motives influencing such tendencies are immaterial.

That no effort was made to achieve a cross section of the community in the *Dennis* period is not in dispute. For the trial judge so found. This finding by the trial judge alone requires that the last be invalidated. But in addition when methods of jury selection have persistently

and over a long period of years produced *substantial disproportions* then it must be held that the methods employed fall short of the cross section requirements.

The jury list and the panel from which the trial jury in this case was drawn deprived petitioners of a fair and impartial trial in violation of the Fifth and Sixth Amendments of the United States Constitution.

Finally, petitioners urge that the jury list and panel from which the trial jury in this case was drawn deprived petitioners of a fair and impartial trial in violation of the Fifth and Sixth Amendments to the United States Constitution. "The defendants' right is to a neutral jury" (*Fay* v. *New York,* 332 U. S. 261, 289). A jury list composed of partisans on the very issues raised in the proceedings cannot produce a neutral jury and violates the constitutional safeguards of due process and a fair and impartial trial.

The Court said in *Fay, supra,* at 288-289:

> "Undoubtedly a system of exclusion could be so manipulated as to call a jury before which the defendant would have so little chance of decision on the evidence that it would constitute a denial of due process."

Such was the case here. The political theory, policies and program of the appellants which were an essential part of the evidence in this case, were contrary to the interests of the class which dominated the jury list.

VI

The petitioners were brought to trial in an atmosphere of prejudice against them created by agencies of the United States Government and calculated to produce a guilty verdict in violation of their constitutional right to a fair trial.

The petitioners moved prior to the trial for a continuance on the ground that not only the community from which the trial jurors were to be drawn, but the nation as a whole, was so pervaded with either a prejudgment of the guilt of the petitioners or a fear that disagreement with such prejudgment would result in social and economic reprisals, that a fair and impartial trial was all but impossible (Vol. VI, Doc. Nos. 179, 180, 202). The voluminous evidence submitted in support of the motion established the existence of such prejudgment and fear. It further demonstrated that they had resulted from an intensive, persistent public campaign conducted by agencies and officers of the Government of the United States, including the Attorney General and various officials and employees of the Department of Justice (ibid.).

During the course of the trial, and at its conclusion, petitioners moved for mistrial on the ground that Government agencies were continuing to carry on an *ex parte* assault against the petitioners outside the courtroom *while the trial was in progress,* in violation of their constitutional and legal rights to a fair trial (Vol. VIII, Doc. Nos. 237, 277; Vol. IX, Doc. No. 283).

Among the many acts of which petitioners complained was the following: On June 25, 1952, while the trial was in progress, the Senate Subcommittee on Internal Security, in collaboration with the F.B.I. issued a pamphlet entitled *Documentary Proof that the Communist Party, U. S. A.*

Teaches and Advocates the Overthrow and Destruction of the United States Government by Force and Violence (Vol. VIII, Doc. No. 237, Ex. A). The pamphlet was released to the press, together wtih a statement by Senator McCarran, Chairman of the Senate Subcommittee on Internal Security. The release of this pamphlet was given widespread front page publicity in the press in the Southern District of New York. Typical of this publicity were the following headlines:

"FBI Says Overthrow by Violence is Stalin Policy for Red Rule Here" (*New York Times,* July 30, 1952);

"Red Documents Cited by FBI as Plot Proof" (*New York Herald Tribune;* Vol. VIII, Doc. No. 237, Ex. C);

"FBI Documents Red Violence Aims" (*New York Daily News;* ibid., Ex. E);

"Secret FBI Report: Red Plan to Rule U. S. Revealed" (*New York Journal American;* ibid., Ex. G).

As proof of its thesis, the pamphlet referred to many writings received in evidence in this case (Vol. VIII, Doc. No. 237, Ex. A; GE 41; GE 4; GE 46; GE 7; GE 57; GE 9), thus expressing the Government's judgment on the meaning of writings, which was a major issue in the case. In addition, it referred to an article by petitioner Weinstone, which was received in evidence in this case (GE 68), and described him as a former teacher in the Lenin School in Moscow, although no evidence thereof was introduced at the trial (Vol. VIII, Doc. No. 237, p. 4). It also made specific reference to petitioner Bittelman, identifying him as being "presently under indictment in New York, charged with a violation of the Smith Act of 1940" (ibid., p. 4).

The pamphlet had no legislative purpose. Its obvious purpose was to create public opinion. The foreword by

Senator McCarran frankly states that the booklet was published because the "awareness" that the Communist Party "had as its avowed object the violent overthrow and destruction of the constitutional government of the United States" "was not common knowledge" (Vol. VIII, Doc. No. 237, Ex. A, p. 3). He concluded:

> "This booklet is the result. I hope it will enable many Americans to recognize, once and for all, the unilateral evil and illegal aims of our enemy, international communism, of which the Communist Party, USA, is one tentacle."

In addition, in his statement to the press, Senator McCarran stated that the "report" had been issued because "there have been some persons who tried to tell us the Communists were not dangerous."*

The Court below justified its affirmance of the denial of the motions for continuance on the grounds that the hostility to members of the Communist Party was so pervasive that "there was no reason to suppose that it would subside by any delay which would not put off the trial indefinitely" (A. App. 218-219). The "choice", it reasoned, "was between using the best means available to secure an impartial trial or letting the prosecution lapse" (A. App. 218). Assuming that this was the sole choice confronting the Court, can it be said that the constitutional safeguards of a fair and impartial trial and of due process may be scrapped when the government itself contributes substantially to the circumstances which make such a trial impossible? We submit not. The Constitution does not envisage a substitute of expediency for due process. There can be no criminal justice if there can be no fair trial. If a fair trial cannot be had, then it must wait. The social necessity for prosecuting

* We do not here detail the remainder of the prejudicial acts of Government which occurred during the course of the trial. Those are fully set forth in Vol. VIII, Doc. No. 277 and Vol. IX, Doc. No. 283.

crime must bow to the greater necessity for justice. *Trial of Aaron Burr*, 430, 469.

But even assuming, *arguendo*, that the choice adopted by the Court below is consistent with the constitutional guarantees of due process and a fair and impartial trial, the "best means available to secure an impartial trial" were not given the petitioners. For they were deprived of what little opportunity for a fair and impartial trial remained, by the continuing activity of Government officials and agencies during the course of the trial, which we have referred to above. In this respect, the situation in the case at bar was an even more aggravated instance of government interference with the right of an accused to a fair and impartial trial, than was that in *Delaney* v. *United States*, 1 Cir., 199 F. 2d 102. The convictions of the petitioners "accompanied by such events do not meet any civilized conception of due process of law" (*Shephard* v. *Florida*, 341 U. S. 50, 53).

VII

Misconduct of the trial jurors deprived petitioners of a fair and impartial trial.

After the evidence was in, but prior to the conclusion of the trial, a letter was received by the trial judge from Mrs. Van Dernoot, an acquaintance of Juror No. 12, Mrs. Sybil Kane, in which she stated, among other things, that Mrs. Kane had said at a private gathering that all Marxists want to overthrow the Government by force and that other jurors concurred in this view (A. App. 117). Accordingly, on December 17, 1952, the trial court conducted an interrogation of the jurors.

The interrogation of the jurors disclosed the following:

(a) Juror No. 3, Mr. Walter D. Lee, testified that Mrs. Kane had expressed to the other jurors views on the case

indicating that "she was flopping now to one side and the next day to the other" (A. App. 117).

(b) Mr. Landis, Juror No. 5, testified that Mrs. Kane had informed him on three separate occasions in the course of the trial, one of which occurred prior to the defense case, that she had made up her mind about the case (A. App. 118), and that "there were other members of the jury that had made up their minds" (A. App. 119, 124).*

(c) Mr. Hallett, Juror No. 6, testified that he heard Mrs. Kane make a statement that could be interpreted to mean that she had made up her mind (A. App. 120), and that she had commented on the importance of various items of evidence (A. App. 121).

(d) Miss Miller, alternate Juror No. 1,** testified that some of the jurors said in words or substance that Marxists in their time wanted to overthrow the Government (A. App. 122).

(e) Mr. Syracuse, alternate Juror No. 4, testified that he believed that all Marxists wanted to overthrow the Government by force (A. App. 123).

At the conclusion of the interrogation, the trial court excused Mrs. Kane, but denied petitioners' motion for a mistrial based on the misconduct of the jury (A. App. 125, 126). The following morning, December 18, 1952, Mrs. Kane telephoned Mrs. Mary M. Kaufman, one of the attorneys for the petitioners. The substance of Mrs. Kane's remarks to Mrs. Kaufman are set forth in an affidavit by Mrs. Kaufman (Vol. VII, Doc. No. 268), which reads in part as follows:

"She [Mrs. Kane] said that with the exception of one or two of the 'nicer jurors', all of the jurors have dis-

* The direction in which Mrs. Kane had made up her mind was indicated by the following from the testimony of Mr. Landis: "I said if she had made up her mind the only thing she could do in *fairness to the defendants* in the case, she should come up to you and tell you" (A. App. 120).

** Miss Miller replaced Mrs. Kane as Juror No. 12.

cussed the issues involved in the case and have expressed opinions and judgment thereon. She stated that at least four of the jurors have held and expressed a judgment on the case adverse to the defendants 'right along'; that they have expressed their views and judgment 'strongly' to the other members of the jury continuously; that others were less outspoken about their judgment of the issues, but also expressed similar judgments adverse to the defendants.

"I asked Mrs. Kane if she would state the names of the four jurors who had expressed strong views adverse to the defendants, and she stated to me that she would not inform me as to the names of those jurors but would inform the Court who those four jurors are."

On the basis of the foregoing statements of Mrs. Kane, petitioners moved for a further investigation of the conduct of the jurors. The trial court denied the motion. Thereupon the petitioners subpoenaed Mrs. Kane, who appeared in court on December 19, 1952. Petitioners advised the trial judge of her presence and requested opportunity to call her as a witness to prove the allegations contained in Mrs. Kaufman's affidavit (A. App. 127). The judge declined to hear her. Petitioners moved for reconsideration of their motion for a further investigation into the conduct of the jurors. They also moved for a mistrial on the ground that the conduct of the jurors resulted in presumptive prejudice, and on the further ground that the jurors had prejudged the issues in the case (A. App. 127-128). The trial judge denied these motions (A. App. 127-128).

That some of the jurors engaged in premature discussion of the issues is plain from their testimony. These discussions, standing alone, constituted such misconduct as to require a new trial (*People* v. *Moltke*, 118 Cal. App. 568; *Martin* v. *Oregon Stages*, 129 Ore. 435, 453-454). The statements of Mrs. Kane and the others "raised the presumption that the rights of the appellants were prejudiced" (*Stone* v. *United States*, 6 Cir., 113 F. 2d 70, 77-78; *Mattox* v. *United States*, 146 U. S. 140, 151).

In view of the record in this case, and the context in which it was tried, the denial of the motion for mistrial constituted an abuse of discretion (*Ewer's* v. *National Importing Co.*, C. C. W. Va., 63 Fed. 562; *Pool* v. *Chicago*, C. C. Ia., 6 Fed. 844; *Winebrenner* v. *United States*, 8 Cir., 147 F. 2d 322).

The refusal of the trial judge to hear the testimony of Mrs. Kane constituted a refusal to exercise his discretion at all. "Where competent evidence is offered it is the duty of the trial court to hear and consider it * * *." *Chambers* v. *United States*, C. C. A. 8, 237 Fed. 513, 521; *United States* v. *Sorcey*, C. C. A. 7, 151 F. 2d 899, 903; *Wheaton* v. *United States*, C. C. A. 8, 133 F. 2d 522, 527; *Stone* v. *United States*, C. C. A. 6, 113 F. 2d 70; *Little* v. *United States*, C. C. A. 10, 73 F. 2d 861, 865; *Mattox* v. *United States*, 146 U. S. 140; *Holmgren* v. *United States*, 217 U. S. 509, 521-522.

The climate in which these petitioners were tried made anything approximating a fair trial all but impossible. In these circumstances it behooved the trial judge to make certain that nothing within the precincts of the court itself should add to the already existing obstacles to a fair trial. Mrs. Kane's disclosures were of such a nature—they so strongly indicated not only premature discussion of the issues by the jurors, but their premature *judgment* as well— that even minimal requirements of due process demanded that the judge hear her testimony and exercise his discretion on petitioners' motion for a mistrial only after hearing that testimony.

CONCLUSION

The writ of certiorari should be issued and the judgment below reversed.

Respectfully submitted,

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